Supreme Court, U.S.
FILED
001311 FEB 13 2001
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No. 00-

IN THE
Supreme Court of the United States

THE BOARD OF THE COUNTY
COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

v.

JILL BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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181 pp

QUESTIONS PRESENTED

1. Whether the Supreme Court's prior opinion and judgment in this cause concerning standards for establishing deliberate indifference and causation mandate reversal of the lower courts' judgments.

2. Whether a County is "deliberately indifferent" under 42 U.S.C. § 1983 for failing to customize training for a particular police candidate, when the Court has found no fault with the state program for training.

3. Whether, in a suit brought under 42 U.S.C. § 1983 for inadequate training, a jury must have considerably more proof than one single incident before the requisite fault on the part of the County, and the causal connection between the County's training policy and the constitutional deprivation, is established.

4. Whether federalism concerns are implicated by a judgment that imposes liability on a County for permitting a reserve deputy to accompany certified police officers during the course of state-mandated academy training, when such service is expressly authorized by the state statute on training.

5. Whether the District Court's instructions to the jury violate *City of Canton v. Harris* by predicating liability solely on adequacy of a particular reserve deputy's training, rather than on a training program applicable to all reserve deputies.

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The opinion of the court of appeals (App. 1a-61a) is reported at 219 F.3d 450. The opinion of the district court (App. 62a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 18, 2000. Petitioner's Petition for Rehearing and Petitioner's Suggestion for En Banc Consideration were denied by written order on December 14, 2000. (App. 118a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Oklahoma Statute 1981, § 547(B) provides:

Each sheriff may appoint as many reserve force deputy sheriffs as are necessary to preserve the peace and dignity of the county. A current list of each person holding appointment shall be maintained by the county sheriff and shall be available to the public. Reserve force deputy sheriffs may perform duties which encompass a particular act or series of acts. A sheriff or salaried deputy shall accompany a reserve force deputy sheriff in the performance of all duties assigned to such reserve force deputy sheriff unless such reserve deputy has completed the required one-hundred-twenty-hour police course. Reserve force deputy sheriffs may receive compensation for their services. Such reserve deputy sheriffs shall complete a one-hundred-twenty-hour basic police course within twelve (12) months after they have been commissioned to be paid by county or individual reserve deputy.

STATEMENT OF THE CASE

The Fifth Circuit's opinion is a direct challenge to this Court's pronouncement that liability for inadequate training under Section 1983 requires proof of "a deficient training 'program,' necessarily intended to apply over time to multiple employees." *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390 (1997), *quoting City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989). That declaration became a dead letter the moment the Fifth Circuit framed the question in terms of the individualized training of a particular officer. *Brown v. Bryan County, OK*, 219 F.3d 450, 457-58 (5th Cir. 2000). Other aspects of this Court's opinion fared no better. In expounding upon "inadequate training" claims, this Court favorably referenced prior decisions, first articulated in *City of Springfield, Mass. v. Kibbe*, which advanced the proposition that "considerably more proof than the single incident will be necessary in every [inadequate training] case to establish . . . the requisite fault on the part of the municipality." *Bryan County*, 117 S. Ct. at 1389, *citing City of Canton, Ohio v. Harris*, 489 U.S. 378, 391-392 (1989); *Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (plurality opinion); *City of Springfield v. Kibbe*, 480 U.S. 257, 270-271 (1987) (*per curiam*) (*dissent* from dismissal of writ as improvidently granted). Paying those decisions no heed, the Fifth Circuit resolved that the fact that there was only one incident here — Burns' encounter with Brown — was no impediment to county liability under Section 1983.

In contrast to its latest opinion, the Fifth Circuit's first review of the record demonstrated precisely what the record reveals: "that Sheriff Moore had enrolled Burns in the state-mandated Council on Law Enforcement Education and

Training (CLEET) program while he worked as a Reserve Deputy" and "there is no evidence that Sheriff Moore did anything less than that which is required by law. . . ." *Brown v. Bryan County, Okl.*, 53 F.3d 1410, 1424-1425 (5th Cir. 1995) (superseded opinion). In its latest opinion concerning *an identical record*, the court now concludes that Bryan County exempted Burns from any training whatsoever. By ignoring direct evidence to the contrary, the court attempts to squeeze the case into the hypothetical circumstance mentioned in *City of Canton* — a complete failure to train officers with respect to deadly force when training is mandated by the certain recurrence of such encounters. As demonstrated more fully below, however, it was never disputed at trial that Burns was trained in the use of force prior to his encounter with Brown. Indeed, counsel for *respondent* first introduced evidence that Burns began academy training prior to the occurrence; respondent's expert agreed that the County complied with all requisites for reserve deputy service; and Burns testified directly that he was instructed on use of force at the academy before he ever came into contact with Brown.

Dissenting from the majority opinion, Judge DeMoss noted the panel's divergence from its own precedent and clear Supreme Court authority. He decried the tortuous procedural route the case took and lamented the damage done to the circuit's rule of orderliness. These circumstances are, indeed, disturbing. Of equal if not greater concern is the Fifth Circuit's assumption that liability under § 1983 is now a matter of individualized determination of the contours of a particular officer's training. If a Section 1983 plaintiff need only show one instance of misconduct and a training deficiency attributable to a single police officer, then we have entered a new era of municipal liability, unconstrained by the prudential restrictions in place since *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

A. Facts of the Case

1. *Stacy Burns was enrolled in law enforcement academy and received training on application of force*

On May 6, 1991, Stacy Burns formally began law-enforcement training under the auspices of Oklahoma's Commission on Law Enforcement Education and Training ("C.L.E.E.T.") program. R. 516; 521; 598; 742. Burns was eligible for selection as a reserve deputy in Oklahoma because he met the statutory requirements in Oklahoma. R. 495. He was 21 years of age, had no criminal conviction precluding employment, and had taken the Minnesota Multiphasic Inventory psychological examination. R. 495-496; 578. Because he was enrolled in the academy, he was authorized by state law to assist law enforcement officers in the field. OKLA. STAT. ANN. tit. 19, Sec. 547(B) (West 1994). He was, without exception, accompanied by a sheriff or salaried deputy sheriff at all times while on duty.

The C.L.E.E.T. academy provides training on many phases of law enforcement, such as patrol tactics, the use of force, handling the mentally ill, use of firearms, crime investigation, sexual abuse, child abuse, public safety, and suicide prevention. R. 494. One form of instruction is particularly relevant here. Candidates for law enforcement are instructed in the use of "auto extraction techniques," which are utilized as the "lowest level of force" available to remove a suspect from a vehicle. R. 391; 505-506; 509-510. One such maneuver is termed the "arm bar" technique. R. 390-393; 506-507. It was undisputed at trial that Stacy Burns was taught use of the arm bar technique, prior to his encounter with Brown, while enrolled at the C.L.E.E.T. academy. R. 516-517; 521; 598; 742.

2. *Bryan County deputies provided informal instruction.*

Burns received informal instruction from Bryan County officers Calclazier and Howell prior to the incident in question. R. 579-585. Burns' grandfather Joe Calclazier, who had completed the academy and had been employed by the County for 16 years, took Burns with him as he patrolled the County. R. 685-686; 690-692; 699. Calclazier taught Burns where to stop automobiles, how to place a suspect in the officer's custody and control, and how to carry out police functions in such a manner as to minimize danger to the officer. R. 690. Burns also learned to erect roadblocks. R. 589-585.

Both Howell and Calclazier taught Burns how to identify intoxicated drivers and the circumstances under which an investigatory stop might be warranted. R. 580-581. Burns also handled radio dispatch for the officers. R. 580-581. In addition, Burns watched programs broadcast by the Law Enforcement Training Network, a closed-circuit television station used as a training tool for law enforcement personnel. R. 579, 581.

Sheriff B.J. Moore prohibited Burns from driving a vehicle or from carrying a revolver. R. 603; 676. Burns was not authorized to make arrests unless a supervising salaried deputy accompanied him. R. 603; 676. Burns never ran afoul of this mandate. R. 582, 585.

3. *Plaintiff's expert witness, Otto Schweizer, conceded Burns' training was in compliance with Oklahoma law.*

Otto Schweizer was the plaintiff's expert on hiring and training of law enforcement officers. Schweizer testified that the County complied with Oklahoma standards both in selecting Burns and permitting him to serve as a reserve deputy. R. 359; 361-362. He took the view, however, that the County's compliance with Oklahoma's laws governing the hiring and training of law enforcement personnel is inadequate. C.L.E.E.T. standards, he said, must be supplemented by departmental training.[1] Schweizer offered a litany of additional training recommendations. He would require, for example, that all patrol cars be equipped with a code of criminal procedure so that officers can study statutes on the job. R. 385. Schweizer testified that law enforcement operations — such as erecting police checkpoints in high-crime areas — should be deferred in lieu of the additional training he advocates. R. 385. Schweizer suggested that the state of Oklahoma should prohibit police candidates from field work until they have completed 100% of their academy training. R. 368.

Schweizer conceded that Bryan County complied with all applicable Oklahoma law regarding Burns' service as a reserve deputy:

> Q. All right. Now, did Stacy Burns violate any Oklahoma standards as set by the Legislature in becoming a reserve deputy?
>
> A. Not that I can tell.

---

1. Schweizer testified: "State training, the minimum training requirements under state law is insufficient, and I've indicated there's a need for departmental training." R. 366-367.

Q. So the Oklahoma — so by Oklahoma statutes, Bryan County Sheriff's Office and Stacy Burns complied with the peace officer qualifications and standards in his hiring and serving as a part-time deputy?

A. That's correct.

R. 361-362. Under Oklahoma law, the referenced statute authorizes reserve deputy sheriffs to "make traffic arrests pursuant to state statutes with the same powers accorded other deputy sheriffs. . . ." Okl. Op. Atty. Gen. 85-46 (1985). Schweizer did not testify about any particular aspect of Burns' training because he did not know specifics of the instruction given Burns. R. 383.

4. *No prior complaints about police misconduct.*

Brown presented no evidence that Bryan County's utilization of reserve deputies has ever resulted in any complaint or lawsuit by any citizen alleging an improper use of force. To the contrary, the evidence conclusively establishes that the County had no notice of past violations, because there were no prior complaints concerning training or use of force. R. 652, 666.

B. Course and Disposition of Proceedings Below

Jill Brown commenced this suit under 42 U.S.C. § 1983 alleging that Bryan County, Oklahoma, Stacy Burns, Robert Morrison, and B.J. Moore were guilty of violating her constitutional rights. Brown alleged that Stacy Burns' actions in forcibly removing her from the pickup truck and handcuffing her amounted to excessive force that deprived her of rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Brown alleged that Bryan County violated the Constitution either: (1) by hiring Burns or (2) failing to adequately train Burns. The district court granted summary judgment in favor of Moore and Morrison, but denied Burns' and the County's motion for summary judgment. The case was tried to a jury. Bryan County moved for judgment as a matter of law at the close of Brown's case and renewed its motion at the close of all of the evidence. Both motions were denied. In addition to numerous other grounds, Bryan County objected to the court's charge on the basis that the evidence conclusively established compliance with applicable state law with regard to the hiring and training of Stacy Burns, that there can be no county liability under § 1983 for one isolated instance of allegedly excessive force, and that the jury interrogatories, which assumed that Bryan County had a "policy" of inadequate training specific to a solitary reserve deputy, was erroneous. (App. 125a-128a). Those objections were denied. (App. 134a).

The jury found that Stacy Burns arrested Jill Brown without probable cause; that Stacy Burns employed excessive force; that Stacy Burns falsely imprisoned Brown; and that Stacy Burns was not entitled to the defense of qualified immunity. The jury also answered interrogatories concerning Bryan County. With respect to liability under § 1983, the jury found as follows:

> 1. . . .that the hiring policy of Bryan County ***in the case of Stacy Burns*** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff;

> 2. . . .that the training policy of Bryan County ***in the case of Stacy Burns*** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff.

(Emphasis added).

The jury assessed a total of $765,300 in actual damages; $87,500 in attorneys fees; and $20,000 in exemplary damages, for a total award of $872,500. Finding no evidence of loss of income in the past or loss of earning capacity in the future, the court rendered judgment against Brown for those amounts. The district court entered judgment against Burns and the County for the $711,302 in actual damages; $87,500 in attorneys fees; and $20,000 in punitive damages. The district court did not award Brown any recovery against defendants Morrison and Moore. Burns and the County appealed the judgment.

There are three reported Fifth Circuit opinions. In the first opinion, (*Brown I*) the court found unanimously that

> A review of the record reveals that Sheriff Moore had enrolled Burns in the state-mandated Council on Law Enforcement Education and Training (CLEET) program while he worked as a Reserve Deputy. As there is no evidence that Sheriff Moore did anything less than that which is required by law, we do not find the training practices inadequate.

Brown v. Bryan County, OK., 53 F.3d 1410, 1424-1425 (5th Cir. 1995). The court held that Brown's failure to adduce evidence of other similar incidents or widespread

misbehavior in the force precluded recovery under the inadequate training claim. *Id.* Nevertheless, the court found sufficient evidence to support what it variously termed Brown's "negligent-hiring," "inadequate screening" or "wrongful hiring" claim. According to the court, a § 1983 plaintiff need not prove similar incidents in order to recover against a county for its decision to hire an individual whose character is "deficient." *Id.* at 1421-1425.

Brown did not challenge the Fifth Circuit's holding on inadequate training. Bryan County, however, sought rehearing of the "inadequate screening" decision. On rehearing, the Fifth Circuit expunged its analysis of the "inadequate training" claim and, with one judge dissenting, affirmed the judgment on the basis that the county's inadequate screening of Reserve Deputy Burns was deliberately indifferent to the public's welfare and the direct cause of Brown's injuries. *Brown v. Bryan County Oklahoma*, 67 F.3d 1174, 1185 (5th Cir. 1995) (*Brown II*).

In *Brown II*, the Fifth Circuit agreed that the law of the State of Oklahoma did not disqualify Stacy Burns from serving as a reserve deputy. *Id.* at 1184 n.20. Nevertheless, the court held that Burns' background evidenced a "deficient character," a "propensity for violence," and a "disregard for the law," all of which precluded his employment. *Id.* The Fifth Circuit concluded that the County's "single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains." *Id.* at 1185.

Bryan County petitioned this Court for a writ of certiorari. This Court granted certiorari, vacated the Fifth Circuit's judgment and remanded the cause for proceedings

consistent with its opinion. *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 407-08, 117 S. Ct. 1382, 1390 (1997). In its opinion, this Court, expounding on its decision in *City of Canton v. Harris*, spoke plainly of the requirement, in inadequate training cases, that a plaintiff demonstrate the County's adoption of a training "program," which must reverberate beyond the particular instance involving an individual officer:

> We concluded in *Canton* that an "inadequate training" claim could be the basis for § 1983 liability in "limited circumstances." *Id.*, at 387, 109 S.Ct., at 1204. We spoke, however, of a deficient training "program," necessarily intended to apply over time to multiple employees. *Id.* at 390, 109 S.Ct., at 1205. Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action — the "deliberate indifference" — necessary to trigger municipal liability. *Id.*, at 390, n. 10, 109 S.Ct., at 1205, n. 10 ("It could . . . be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to

> the need"); *id.*, at 397, 109 S.Ct., at 1209 (O'CONNOR, J., concurring in part and dissenting in part) ("[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations . . ."). In addition, the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the "moving force" behind the plaintiff's injury. *See id.* at 390-91, 109 S.Ct., at 1205-1206.

Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 407-08, 117 S. Ct. 1382, 1390 (1997).

Application of that law to the facts of this case should have resulted in a *per curiam* reversal of the district court's judgment. Rather than deciding the remaining issues, however, the Fifth Circuit remanded the cause to the district court. On remand, the district court again entered judgment against Bryan County based on the jury's finding that Bryan County did not sufficiently train reserve deputy Burns. Bryan County timely filed another notice of appeal.

In *Brown III*, the Fifth Circuit, reviewing the *same record* in which it previously determined that Burns was trained by the law enforcement academy and that Brown's "inadequate training program must fail," now concluded that "Sheriff Moore's considered policy decision not to require training for Burns can be said to constitute 'deliberate indifference'

to the Fourth Amendment rights of those citizens Burns would encounter." *Brown v. Bryan County, OK*, 219 F.3d 450, 463 (5th Cir. 2000). The court brushed aside this Court's directive that liability be predicated on adoption of "a deficient training 'program,' necessarily intended to apply over time to multiple employees." Instead, it found the County liable based on an inference that the County affirmatively decided to exempt one deputy — Stacy Burns — from training, ignoring direct and uncontradicted evidence (and its own prior holding) that Burns received academy training in the very maneuver used to arrest Brown. The Fifth Circuit then rejected authority of this Court, *referenced by this Court in this case*, that "[w]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the 'policy' and the constitutional deprivation." *Bryan County*, 117 S. Ct. at 1389, *citing City of Canton, Ohio v. Harris*, 489 U.S. 378, 391-392 (1989); *Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (plurality opinion); *City of Springfield v. Kibbe*, 480 U.S. 257, 270-271 (1987) (*per curiam*) (*dissent* from dismissal of writ as improvidently granted).

The Fifth Circuit modified the judgment to significantly increase the damage award in contravention of its prior (unchallenged) opinion in *Brown II*, provided a credit for costs incurred by Bryan County in the United States Supreme Court, and otherwise affirmed the District Court's judgment. Eight judges initially voted for *en banc* reconsideration but, after an episode of extraordinary vote-switching at the eleventh hour, the court ultimately denied *en banc* reconsideration by a seven-to-seven vote. *Brown v. Bryan County, OK*, 235 F.3d 944 (5th Cir. 2000) (DeMoss, J., dissenting from denial of en banc reconsideration).

Dissenting from *Brown III*, Judge DeMoss observed that the Fifth Circuit "had a clear and consistent precedent that in order to recover against a municipality under § 1983 on a failure-to-train claim, the plaintiff must establish something more than a single instance of injury or an isolated case of one poorly trained employee." *Brown III*, 219 F.3d at 474. In Judge DeMoss's view, the majority's holding was written "[i]n their haste to find a 'deep pocket' from which Mrs. Burns (sic) may recover the compensation determined by the district court." *Id.* at 472.

REASONS FOR GRANTING THE WRIT

As it did in the hiring context, the Fifth Circuit has adopted a federal training policy that supplants the state of Oklahoma's. Under the court's formulation, state officials would no longer have dominion over training policies; instead, those policies would necessarily succumb to *ad hoc* decisions by federal courts which would have authority to require supplemental training attuned to the individual circumstances of each recruit. If a reserve deputy has a misdemeanor conviction or other blemish on his record, Oklahoma law would no longer govern the scope of his training; rather, the County would be compelled to expend resources toward adoption of a training program accommodating that particular cadet. The County would, of course, have no prior assurance that the training program would ultimately earn the imprimatur of a Federal Court. This assault on federalism is a direct result of the Fifth Circuit's circumvention of this Court's writings, not to mention its own precedent, governing municipal liability under § 1983.

I.

THE FIFTH CIRCUIT'S OPINION CIRCUMVENTS THIS COURT'S OPINIONS IN *BRYAN COUNTY* AND *CITY OF CANTON*

It has been clear for decades that municipal fault may not be premised on *respondeat superior* liability. *Monell v. Department of Social Services*, 436 U.S. 658, 694-695 (1978). Instead, a municipality may be held liable for the actions of an employee only when municipal "official policy" causes a constitutional violation. *Id.* The court has repeatedly observed, for example, that "[i]t is only when 'the execution of the government's policy or custom . . . inflicts the injury' that the municipality may be held liable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989), *quoting Springfield v. Kibbe*, 480 U.S. 257, 267 (1987). This Court's jurisprudence has remained consistent since its adoption in 1989: A municipality's failure to train a particular officer may serve as the basis for section 1983 liability where — and only where — the failure to train amounts to a "deliberate" or "conscious" choice by the municipality to disregard the rights of persons with whom the police come into contact. *City of Canton*, 489 U.S. at 389.

There are only three instances in which a municipality can be said to have violated the civil rights of a person: (1) adoption of an express policy which, when enforced, causes a constitutional deprivation, *see, e.g.*, *Monell*, 436 U.S. at 690; (2) "a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law,' " *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion) (*quoting Adickes*

v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970); or (3) when the constitutional injury was caused by a person with "final policymaking authority." *Praprotnik*, 485 U.S. at 123; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion).

A. No Express Policy

The core circumstance for finding municipal liability is presented by a municipal policy that itself affirmatively authorizes the constitutional wrong. Where that is shown, the connection between the policy and the harm is plain. As a result, "[p]roof of a single incident of unconstitutional activity is . . . sufficient to impose liability under *Monell*" when "proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion). *Monell* itself was the quintessential example of liability based on a facially unconstitutional policy. There, the city compelled pregnant employees to take unpaid leaves of absence before leave was medically required, which was previously held by the supreme court to violate constitutional dictates. *Id.* at 660-62.

In the case at bar, as this Court has already observed, there is no allegation and no proof that Bryan County adopted a policy designed to further the deprivation of constitutional rights. Municipal liability cannot, therefore, be premised on adoption of an express policy.

B. No Widespread Practice Amounting to Custom

A municipal "custom" presupposes a "persistent and widespread practice" that has become "so permanent and well settled as to constitute a "custom or usage with the force of law." *Monell*, 436 U.S. at 690 *quoting Adickes*, 398 U.S. at 167. A municipality thus becomes accountable for acquiescing in a "custom" only when it knowingly tolerates a pattern or practice of unconstitutional conduct.

In the present case, the only "pattern" is of compliance with state law concerning reserve deputies. With the exception of the present case, the county had not received any complaint alleging that any officer or reserve deputy was abusive to, or utilized excessive force on, any citizen. R. 652, 666. In fact, there had never been any complaint against the Bryan County Sheriff's Department during Sheriff Moore's tenure. *Id.* With the sole exception of Jill Brown's complaint, Burns' conduct as a reserve deputy was never questioned. R. 581. Thus, there can be no liability based on the county's acquiescence in a pattern of abuses.

C. Brown's Injuries Caused by Low-Level Employee

Brown's prior argument to this Court was that a simple application of *Monell*, as informed by *Pembaur v. Cincinnati*, is all that is required to render the county liable. This Court, however, observed that, in *Pembaur*, the county prosecutor specifically directed county deputies to take an action resulting in the deprivation of the plaintiff's rights. *Bryan County*, 520 U.S. at 406-07, 117 S. Ct. at 1389-1390. Such a case presents no difficult questions of fault and causation.

This is not such a case. The injuries alleged by Brown resulted from a one-time application of force by a low-level reserve deputy. Brown has never suggested that Sheriff Moore directed Burns to utilize that force; rather, she contends that the county's failure to supplement Burns' training caused Burns to use excessive force. Brown's theory for recovery thus brings this case squarely within the framework of the "deliberate indifference" analysis set forth in *City of Canton*. *See City of Canton*, 489 U.S. at 399-400 (isolated misconduct of low-level officer will not support municipal liability) (O'Connor J., concurring in part and dissenting in part).

II.

CITY OF CANTON v. HARRIS PRECLUDES BRYAN COUNTY'S LIABILITY

City of Canton made clear that in the absence of a pattern of constitutional violations, challenges to the scope of an existing training program cannot support a finding of deliberate indifference. The Court explained: "Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." 489 U.S. at 391. In that passage, Justice O'Connor could easily have been referring to Schweizer's testimony that the County was required to supplement Burns' training before authorizing him to assist certified deputies on the street.

This Court further noted that, unless proof of a prior pattern of constitutional violations were required, failure-to-train claims would quickly devolve into a regime of *de facto respondeat superior* liability. As Justice O'Connor

explained: "Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *Id.* at 395 (O'Connor, J., concurring in part and dissenting in part). Because Brown cannot establish any pattern of prior constitutional violations, the requisite notice to the county cannot be established under this record.

In lieu of notice, Brown relies on dicta in *Canton* that a single violation of federal rights, accompanied by a showing that the municipality failed to train its employees, may trigger municipal liability. That "hypothetical" holding would arise, *if at all*, in only a "narrow range of circumstances" involving a conscious "decision not to train" a police officer. *Bryan County*, 520 U.S. at 409, 117 S. Ct. 1391. Under the record in this case, however, there is no evidence of any such decision. Indeed, evidence Brown first introduced, and which Burns later confirmed, established without doubt that the County enrolled Burns in the state's training academy and that he was trained in techniques for application of the use of force.

A. Oklahoma Law Sanctions Reserve Deputy Training by C.L.E.E.T. Academy; Bryan County Deputies Supplemented that Training with Informal Instruction.

The Fifth Circuit relied on an inference that Burns did not receive training at the C.L.E.E.T. academy prior to May 12, 1991. R. 1087. The record refutes that conclusion. It was Brown (and not Burns or Bryan County) who first established the date Burns began his training at the academy.

Through his questioning of Ken Barnes, Brown's counsel established that Burns enrolled in and began formal training at the C.L.E.E.T. academy on May 6, 1991. R. 516. Burns testified unequivocally that he not only attended the academy, but received instruction on use of the arm bar technique he subsequently employed in this case. R. 598. Brown's counsel pointedly argued to the jury that Burns "began his training with C.L.E.E.T. on May the 6th. . . ." R. 742. Rather than even hinting that training never took place, Brown's attorney urged the jury to conclude that the county's *compliance* with C.L.E.E.T. standards was *not enough* to absolve the county of culpability. R. 769.

Moreover, the evidence establishes that Burns did, in fact, receive training in accordance with Oklahoma legislation and was specifically trained in the very procedure Brown claims resulted in her injuries. R. 598. Brown's expert witness admitted that Bryan County had authority under state law to utilize reserve deputies to assist in law enforcement endeavors and also agreed that Bryan County complied with state statutes in allowing Burns to serve as a reserve deputy. R. 359-362; *see also* Title 19 O.S. 547(B); Op. Okla. Atty. Gen. No. 85-46 (1985) (sheriff is authorized to assign reserve deputy sheriffs to make arrests and to exercise same powers and authority as accorded deputy sheriffs).

In addition to his C.L.E.E.T. academy training, Burns received specific instruction by local deputies on how to place a suspect under custody and control. R. 579-585; 690-692. Indeed, the fact that Burns had lawfully utilized his training on several occasions prior to the incident at issue here effectively demonstrated his competence to carry out proper law enforcement work without injury to himself or others. R. 582-583; 628.

Ken Barnes, a sworn peace officer with the State of Oklahoma and senior instructor at the C.L.E.E.T. academy, explained precisely what instruction is given reserve deputies concerning application of auto-extraction techniques. R. 505. Students are taught how to use an arm bar maneuver as a low-level application of force to control a suspect without causing harm. R. 505-06. Burns was taught that technique at the academy. R. 492, 598. It is clear, then, that the Fifth Circuit's no-training conclusion collapses under the weight of direct testimony that Burns attended the academy and direct evidence of the nature of instruction given at the academy.

B. Fifth Circuit's Judgment Undermines this Court's Opinions in *City of Canton* and *Bryan County*.

In its haste to grasp a theory upon which liability could be imposed, the Fifth Circuit seized upon this Court's acknowledgement that "in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Bryan County*, 520 U.S. at 409. The source of that acknowledgement was footnote 10 in *City of Canton*, which explained that a municipality's conscious decision to deploy officers, *knowing* those officers were *never instructed* on the use of *deadly force*, could conceivably evidence deliberate indifference. *City of Canton*, 489 U.S. at 390 and n.10. The Fifth Circuit's analogy to footnote 10 is, at best, strained. At worst, its application on this record reveals a concentrated effort to reach a conclusion despite the absence of a valid premise.

As noted elsewhere in this petition, this is not a case in which the County chose consciously to exempt Burns from

training. Respondent conceded that Burns was enrolled and trained at the C.L.E.E.T. academy before the incident in question. R. 742. That training, which Burns subsequently utilized during the Brown encounter, involved the lowest possible level of force an officer could employ short of oral persuasion. R. 391; 505-506; 509-510. Burns had properly employed that force successfully prior to May 6, 1991. R. 582-583; 628; 691. There is no evidence that the County was aware of any deficiency in the training that Burns received.

In the absence of evidence even remotely similar to footnote 10, the only other basis for liability is that the County should have provided Burns more or different training. On this score, the Fifth Circuit's *first* opinion, quoting *City of Canton*, is beyond reproach:

> That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program.... Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct.

Bryan County I, 53 F.3d at 1424, *quoting City of Canton*, 489 U.S. at 390-91.

The ease with which an inadequate training theory could devolve into *respondeat superior* liability, absent the prudent restrictions in place since *City of Canton*, explains why this Court insisted that the theory be premised on an inadequate training "program, necessarily intended to apply over time

to multiple employees." *Bryan County*, 520 U.S. at 407. It also explains why the Court determined that the best indication of deliberate indifference is continued adherence to an approach that has been shown to produce constitutional violations. *Id.*

The Fifth Circuit is no stranger to this jurisprudence. Indeed, in numerous cases, the circuit had held that "proof of a single violent incident ordinarily is insufficient to hold a municipality liable for inadequate training. *The plaintiff must demonstrate 'at least a pattern of similar incidents in which the citizens were injured . . . to establish the official policy requisite to municipal liability under section 1983.'* " *Snyder v. Trepagnier*, 142 F.3d 791, 798-99 (5th Cir. 1998) (*quoting Rodriguez v. Avita*, 871 F.2d 552, 554-55 (5th Cir.) (emphasis supplied), *cert. denied*, 493 U.S. 854 (1989); *see also Piotrowski v. City of Houston*, __ F.3d __, 2001 WL 6712 (5th Cir. Jan. 17, 2001); *Conner v. Travis County*, 209 F.3d 794, 797 (5th Cir. 2000); *Fraire v. City of Arlington*, 957 F.2d 1268, 1287 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992); *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

Jill Brown failed, as a matter of law, to demonstrate that Bryan County had an inadequate training *program* or that there was a *pattern* of similar incidents that would establish an official *policy* requisite to municipal liability under § 1983. *Bryan County*, 520 U.S. at 407-08, 117 S. Ct. at 1390; (failure to train liability under § 1983 presupposes deficiency in training "program" necessarily intended to apply over time to multiple employees). Her theory was that Officer Burns, individually, required more or different training than he was given and that the failure to supplement his training led to her individual injury. She has never attempted to prove that

the alleged deficiency pre-dated the encounter upon which suit was brought. Moreover, Brown cannot establish a "direct link" between Burns' training and Brown's injuries. That missing link, as demonstrated more fully below, is fatal to Brown's § 1983 action.

III.

NO EVIDENCE THAT COUNTY'S DELIBERATE CONDUCT WAS "MOVING FORCE" BEHIND THE INJURY

Even if a plaintiff *could* establish municipal liability on evidence of one act of misfeasance by a low-level employee, Brown has not shown that Bryan County's actions were "certain" to lead Burns to commit an unconstitutional act.

Schweizer's testimony certainly did not meet that burden. Schweizer's position is that a county's deliberate indifference is established any time the county selects an officer for duty without first supplementing his or her training departmentally. One should not be surprised, then, when Schweizer summarily concludes that Bryan County's reliance on state-mandated training amounts to deliberate indifference. R. 352. His words, however, are hollow. Schweizer was unaware of the nature or content of Burns' training. R. 383. His opinions, then, are based on nothing but surmise and utter speculation. Schweizer's testimony on causation is no evidence at all.

In any event, Brown cannot meet the "rigorous" standards of culpability and causation that pertain when a plaintiff claims not that the municipality itself violated the constitution, but indirectly caused another to do so.

Bryan County, 520 U.S. at 415, 117 S. Ct. at 1394. In the first place, Brown cannot say whether Burns' training in the use of the arm bar technique was adequate or not, because she failed to produce any evidence of the details of that training. The omission is fatal, because Brown has the burden to prove more than simply unsatisfactory training. *City of Canton*, 489 U.S. at 391. Brown has the further burden to demonstrate that the county's training inadequacies, rather than some shortcoming peculiar to Burns, caused the injury. *Id.* at 390-391 ("That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other that a faulty training program.").

IV.

DISTRICT COURT'S INFERENCES SUGGEST RELIANCE ON SINGLE INCIDENT WITHOUT PROOF THAT DEPRIVATION OF RIGHTS WAS MORALLY CERTAIN IN THE CASE OF STACY BURNS

This Court previously held that even if Moore were aware of the misdemeanors on Burns' record, such knowledge would not justify a conclusion that Burns had "a proclivity to violence against the person." *Bryan County*, 520 U.S. at 414 n.2, 117 S. Ct. at 1393 n.2. Nothing about Burns' involvement in a "single fraternity fracas" makes it morally certain that he would use excessive force. *Id.* Were it otherwise, any officer involved in a "fracas" prior to service on the police force would, unless specially trained, subject the municipality to liability for "deliberate indifference" if he violated a citizen's constitutional rights.

In a similar context, the Fifth Circuit refused to adopt such a requirement as a new constitutional rule. *Snyder*, 142 F.3d at 799.

This Court has also rejected the Fifth Circuit's reliance on miscommunications concerning Morrison's supervision of Burns. R. 1088-1089. A mere failure of communication about the respective roles between reserve deputy and deputy is negligence. This Court has made clear that "[a] showing of simple or even heightened negligence will not suffice" to establish municipal liability. *Bryan County v. Brown*, 520 U.S. 407, 117 S. Ct. at 1390. Moreover, the Fifth Circuit's assumption that Morrison had no instruction on how to work with a reserve deputy officer is false. R. 1089. Officer Morrison testified that, although Bryan County did not itself instruct on that relationship, he was nevertheless trained in that respect. R. 487.

The Fifth Circuit also found "deliberate indifference" as a result of circumstances surrounding Jill Brown's detention. The fundamental problem with reliance on the incident itself is that, in virtually *any* case alleging a deprivation of rights, a plaintiff can point to evidence that more or different training may have avoided the injury-causing conduct. *City of Canton*, 489 U.S. at 391. The Fifth Circuit's analysis would completely engulf *City of Canton* and *Monell*. Even assuming Brown would not have been injured if Burns had used another technique, that does nothing to prove that Burns was not trained in the use of force, or that Bryan County's policy is the "functional equivalent of a decision by the [county] itself to violate the Constitution." *City of Canton*, 489 U.S. 395 (O'Connor, J., concurring).

With respect to the court's collateral inferences — relating to Burns' training about road blocks, pursuit across

state lines, or the relative positioning of officers during an investigative stop — not one demonstrates the "moving force" necessary to establish municipal liability. It is unclear, for example, how a failure to instruct on making an arrest in Texas "caused" or even contributed to the injuries at issue here. Equally puzzling is the court's reliance on the purported absence of training on setting up a roadblock, or Burns' decision to cross in front of, rather than behind the truck to effect Brown's arrest. *Brown III*, 219 F.3d at 465.

The danger in the Fifth Circuit's approach is in its assumption that a federal question lurks behind each and every particular of a municipality's training function. Under this approach, once the court identifies various and sundry omissions in a training program, any injury suffered at the hands of a police officer makes the officer's municipal employer potentially liable under § 1983. That is clearly an overreaching which this Court repeatedly has cautioned against. *City of Canton*, 489 U.S. at 392; *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (rejecting district court's pronouncement that federal courts have legal power to "supervise the functioning of the police department").

CONCLUSION

The record flatly contradicts the Fifth Circuit's reliance on an inference that Burns was not trained, as forcefully demonstrated by respondent's admission of training at trial and the circuit's own rejection of the inadequate training claim in *Brown I*. The respondent first introduced evidence establishing the beginning date of Burns' academy training. The respondent's attorneys argued to the jury that Burns began training at the C.L.E.E.T. academy on May 6, 1991. Brown's expert testified that Bryan County complied with all laws related to the selection and utilization of reserve deputies.

Brown's theory at trial (which has now been endorsed by the Fifth Circuit) was that state-law is inadequate and justifies federal intervention through the mechanism of § 1983. Whether premised on a theory of inadequate screening or, as here, failure to train, that proposition writ large would engage the federal courts in an endless exercise of federal oversight of municipal policy. If the Fifth Circuit's judgment stands, counties and municipalities across the country will be obliged to scrutinize the background of every officer and adopt a training program customized to that officer, supplanting states' own legislative prescriptions for law enforcement service. "This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism." *City of Canton*, 489 U.S. at 392; *see also Bryan County*, 520 U.S. 415, 117 S. Ct. at 1394 (failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose).

Bryan County submits that an objective review of the record conclusively defeats the Fifth Circuit's conclusion that Bryan County affirmatively decided to exempt Burns from training. The Fifth Circuit's disregard for this Court's pronouncements should not be allowed to stand. Bryan County requests that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JULY 18, 2000

United States Court of Appeals
Fifth Circuit.

JILL BROWN,

Plaintiff-Appellee-
Cross-Appellant,

v.

BRYAN COUNTY, OK; et al.,

Defendants,

BRYAN COUNTY, OK,

Defendant-Appellant-
Cross-Appellee,

STACY BURNS,

Defendant-
Cross-Appellee.

No. 98-40877.

July 18, 2000.

* * *

Appendix A

Appeals from the United States District Court
for the Eastern District of Texas.

Before REYNALDO G. GARZA, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal presents a case brought under 42 U.S.C. § 1983 for injuries resulting from excessive force by an arresting officer, for which Bryan County, Oklahoma, was found liable by a jury on the basis of its failure to provide any training to a reserve deputy who was allowed to make arrests. Stacy Burns, a young, inexperienced reserve sheriff's deputy, without the benefit of training or supervision, participated in a car chase and arrest involving the use of force. Because of the manner in which Burns effectuated the arrest, the plaintiff, Jill Brown, suffered severe knee injuries. The question is whether Bryan County can be held liable under Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), for her injuries because the County failed to train Burns.

We conclude that the evidence, given the standard of review of a jury verdict, fairly allowed the jury reasonably to conclude that Bryan County's sheriff, admittedly a policymaker, failed to train Burns in the light of facts demonstrating an obvious need to train him. We think the jury reasonably concluded that, given notice of the need to train Burns and that the consequences of the failure to train him were so obvious, that the County is culpable for its failure to train him. Furthermore, the evidence allowed a

reasonable inference that the decision not to train Burns was the "moving force" behind, i.e., directly caused, the injuries suffered by Brown. Given these conclusions, we hold that Brown established that Sheriff Moore's decision not to train Burns constituted a policy decision for which the County is liable under § 1983.

The case has a significant procedural history. We have issued two previous opinions, see Brown v. Bryan County, Oklahoma, 53 F.3d 1410 (5th Cir.1995), withdrawn and superseded by, 67 F.3d 1174 (5th Cir.1995), and the Supreme Court has considered the case. See Bd. of the County Comm'ns of Bryan County v. Brown, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). When the Supreme Court reversed our decision upholding liability against the County on the basis of its hiring decision,[1] we remanded to the district court for further consideration. Specifically, the district court had to decide whether liability against the County could be upheld on the basis of the jury's finding that the County had a policy of not training its officers. 117 F.3d 239, 240 (5th Cir.1997). On remand, the district court denied the County's motion for judgment as a matter of law

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1. With this vacatur, our previous opinion is no longer the law of the case. See Johnson v. Chicago Bd. of Educ., 457 U.S. 52, 53-54, 102 S.Ct. 2223, 72 L.Ed.2d 668 (1982) ("Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals."); O'Connor v. Donaldson, 422 U.S. 563, 577 n. 12, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) ("Of necessity, our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case.").

and upheld the earlier jury verdict in favor of the plaintiff. The County appeals the district court's denial of its j.n.o.v. motion. In a cross-appeal to this second judgment, Brown complains that the district court struck all compensatory damages for lost income and lost earning capacity, and reduced to a nominal award damages awarded for her abstract injuries from the violation of her constitutional rights.

We affirm the judgment as it relates to the County's liability under 42 U.S.C. § 1983. We also affirm the district court's judgment with respect to damages.

I

The jury awarded Jill Brown extensive damages on her 42 U.S.C. § 1983 claim against the County for injuries she sustained because of the excessive force used by the arresting officer, Reserve Deputy Burns. The jury found that Bryan County policymaker, Sheriff B.J. Moore, failed to train Burns in the proper use of force.[2] The jury specifically found that "the training policy of Bryan County . . . was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff." Brown argues that this failure-to-train policy was the "moving force" behind her injury. This much is undisputed: Sheriff Moore is a final policymaker for Bryan County and Burns used excessive force against Brown in violation of her Fourth Amendment rights to be free from unreasonable seizures. The question is whether the County can be held liable for these injuries under § 1983.

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2. The jury also reached similar conclusions about the County's decision to hire Burns. The jury's conclusions with respect to Brown's failure-to-train claim were separate and apart from the hiring conclusions.

Appendix A

II

The underlying events occurred in the early morning hours of May 12, 1991. Todd Brown was driving a pickup truck from Texas into Oklahoma, with his wife as a passenger, when he saw a roadblock ahead. He decided, for reasons the jury could have accepted as plausible, to turn around. The execution of the 180 degree turn and the speed of the pursuit that followed were hotly disputed before the jury. Jill Brown claims to have been asleep through most of this event. The County deputies eventually stopped the Browns' truck on an unlighted country road.

The events leading to Jill Brown's injuries were also disputed. As we must, we accept the version of the facts most favorable to upholding the verdict. Indeed, it is not contested that Burns's application of excessive force resulted in a constitutional injury in violation of Brown's Fourth Amendment rights. Burns removed Brown from the truck using, what he claimed, an "arm bar" technique. Brown testified that Burns used force despite her best efforts to comply with Burns's command to her to exit the truck. Burns says that he needed to use this technique because she was unresponsive to commands to get out of the vehicle.[3]

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3. The jury had reason to question Burns's credibility. On the stand, Burns admitted lying in his deposition and to changing his deposition answer only when threatened with a perjury charge. Burns then proved less than forthcoming in his trial testimony, omitting facts of his arrest record until pressured during cross-examination. Thus, the jury may have been skeptical of his other testimony on critical issues, especially those facts going to any training he might have received, or, for instance, his claim that he took the Minnesota Multiphasic Personality Inventory test.

According to Burns, Brown was bending forward in her seat after Burns opened the truck door. Burns interpreted this as a threatening gesture, that is, she may have been reaching for a gun. Burns, however, admits that Brown did not struggle, did not strike out, and did not even say anything to him during the course of the event. In the process of removing Brown, Burns grabbed her, pulled her from the truck, and spun her to the ground. She landed on the pavement knees first. Either during or immediately after application of the "arm bar" technique, Burns had at least one knee in Brown's back. As a result of the incident, Brown suffered severe knee injuries.

It is important to note some pertinent background facts relating to Burns. At the time of the incident, Burns was only twenty-one years old. He was also inexperienced. He had been on the force for a matter of weeks. He had no experience as a law enforcement officer before beginning work as a reserve deputy for the County. His educational background consisted of a high school diploma and a few semesters of college. Although purporting to have majored in criminal justice, Burns testified that he had not taken any law enforcement courses. His work experience consisted of general delivery and sales — "kind of a 'go-fer' " — for two furniture companies.

His record of having engaged in some inappropriate conduct before joining the force is undisputed. Within the two-year period before his hire, Burns had been arrested for assault and battery, resisting arrest, public drunkenness, driving while intoxicated, possession of false identification, driving with a suspended license, and nine moving traffic

violations.[4] At the time he was hired, Burns was in violation of the terms of his probation; for that reason, he had an outstanding warrant for his arrest.[5]

Finally, his conduct for the short time that he had been on the force also suggested a problem. Specifically, the jury reasonably could have concluded that he had an excessive number of "takedown" arrests, similar to the one in which Jill Brown was injured.

We also note several relevant background facts with respect to operation of the sheriff's department. Here, the evidence, viewed in the light most favorable to the jury's verdict, showed the County to have a policy of providing no training itself for its regular officers and reserve deputies. The record indicates that the County's practice was to hire individuals for full-time positions who had already received training from Oklahoma's Commission on Law Enforcement Education and Training ("CLEET") program.[6] With respect

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4. The more serious of these offenses all arose from one incident involving a fracas while a college student.

5. The evidence here buttresses testimony by the County's expert that Sheriff Moore disregarded the statutory requirements for hiring of a new officer, such as the mandate that a new hire be subjected to a personality test, undergo fingerprinting so that the FBI and OSBI can perform background checks, and that a form be submitted to CLEET on the date of hire so that the twelve-month training clock starts to run.

6. The CLEET program trains officers and potential officers in all aspects of law enforcement, including patrol tactics, the use

(Cont'd)

to reserve deputies of Bryan County, the record is not entirely clear whether CLEET is mandatory. The County also made available television training programs through the Law Enforcement Training Network ("LETN") (although Sheriff Moore testified that there is no requirement that the programming actually be watched), and there remained the possibility that an officer could receive ad hoc on-the-job training.

Sheriff Moore acknowledged that the County itself does not train its officers. Confirming this admission, Sheriff Moore further testified that there were no funds to train personnel.[7] Both the plaintiff's expert and the defendants' expert corroborated this lack of training, and it was stressed to the jury during the plaintiff's closing argument. Further substantiating Sheriff Moore's testimony about the absence

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(Cont'd)
of force, public safety, and the like. Students in CLEET are specifically trained in the use of "auto extraction techniques," such as the arm bar technique allegedly employed by Burns. Our opinion should not be construed to reflect a finding that training through CLEET is somehow inadequate. The parties appear to agree that CLEET training is mandatory for all Oklahoma police officers, full-time or reserve. See, e.g., Okla. Stat. Ann. tit. 70 § 3311(D)(2).

7. We are sympathetic to the budget problems of local governments, especially rural counties. The plaintiff's expert, however, outlined a range of no-cost training options. The County's expert testified that CLEET provides training material for local police forces at no cost, will work with local police agencies to develop a training program without charge, and holds free regional training sessions across the State of Oklahoma. According to the evidence, Sheriff Moore elected not to pursue any of these options.

of County-provided training, Officer Morrison, Burns's partner during the incident, testified that, although he completed CLEET training before joining the County's force (through working in another county), he had received no training from the County.

The County's handling of Burns also reflects its lack of a training program. At his deposition, Burns testified that he had received no training through Bryan County. Specifically, he testified that he received "no formal training." He did not even receive any "written documentation from Bryan County as to [his] duties as a reserve officer."

Burns did testify, however, that he received several months of training at CLEET, had gone on "ride-alongs" with his grandfather (a special deputy) and another officer, and watched police training videos via the LETN network. The jury, however, reasonably could have rejected these claims. Particularly noteworthy is the strong evidence, which the jury could reasonably have believed, showing that Burns never attended CLEET. First, he could not remember any dates on which he would have attended this program. The evidence showed that he did not apply for CLEET training until May 6, 1991, only six days before the Brown incident although he had been serving as a reserve deputy for four or five weeks. Given that CLEET classes are held only three days per week, he could not have attended more than three classes. Other evidence shows, however, that he attended no classes before the Brown incident. Burns's Employment Status Sheet, which must be filed with CLEET within ten days of hire, is dated June 12, 1991, thirty days after the Brown incident, or in excess of two months after his hire.

Appendix A

Another form that had to be completed before Burns could be accepted into the CLEET program was dated May 30, 1991, eighteen days after the Brown incident. With respect to the "ride-alongs" and LETN, the jury could have discredited, or at least minimized, Burns's claims in the light of his often contradicted testimony. Although there is some evidence that Special Deputy Joe Calclazier, his grandfather, provided some ad hoc training to Burns, the record suggests that this training was minimal at best and included no training on arrest situations.[8]

Closely connected to its practice of providing no training, the evidence reasonably supported a conclusion that the County also failed to provide formal, and very little effective, supervision for its reserve deputies who were "on the street." Moore acknowledged that he gave no explicit instructions to any deputy about his responsibilities to supervise a reserve deputy. The officer accompanying Burns during the incident testified that he received none. The County's own expert testified that such supervision of an "inexperienced, untrained" officer is required. The County's expert also testified that a reasonable police chief would have provided these guidelines to his regular deputies and to reserve deputies.

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8. Special Deputy Calclazier testified that he "tried to impart what knowledge [he] had in law enforcement including 'ideas' on '[p]ositions, where you stopped automobiles, custody and control.' In other words, to watch people, if when you have them stopped to be sure one of them couldn't hurt you. There's — there's ways that you watch, keep an eye on things." That is the entirety of his statement.

Appendix A

III

We review de novo the district court's ruling on a motion for judgment as a matter of law. See Travis v. Bd. of Regents of Univ. of Texas, 122 F.3d 259, 263 (5th Cir.1997). A motion for judgment as a matter of law will be granted only if

> the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict. . . . On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied. . . .

Boeing v. Shipman, 411 F.2d 365, 374 (5th Cir.1969) (en banc), overruled on other grounds, Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir.1997) (en banc). "A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." Harrington v. Harris, 118 F.3d 359, 367 (5th Cir.1997). We consider all of the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party. See Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir.1996). Although we review denial of a motion for judgment as a matter of law, we note that our standard of review with respect to a jury verdict is especially deferential.

See, e.g., Snyder v. Trepagnier, 142 F.3d 791, 795 (5th Cir.1998) ("We may overturn a jury verdict only if it is not supported by substantial evidence, meaning 'evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.' We accord all reasonable inferences to the nonmovant, and we reverse only if no reasonable jury would have arrived at the verdict.").

IV

It is clear that a municipality's policy of failing to train its police officers can give rise to § 1983 liability. "[T]he failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." City of Canton v. Harris, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) The difficult legal question, however, is whether here the County may be liable for the decision of Sheriff Moore, a policymaker, not to train Burns.

Here, the parties have stipulated to constitutional injury and the existence of a policymaker. Therefore, to establish whether the district court correctly judged § 1983 liability appropriately here, we look for the remaining elements to establish the County's liability in this case: (1) a decision by a decisionmaker that amounts to a policy under Monell and its progeny; (2) a decision so deliberately indifferent to the rights of the citizens that the County fairly can be said to be culpable for the injury; and (3) sufficient causation between the specific policy decision and the resulting constitutional injury.

An official policy, for purposes of § 1983 liability, is "[a] policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir.1984) (en banc). Alternatively, official policy is "[a] persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Id. Finally, "a final decisionmaker's adoption of a course of action 'tailored to a particular situation and not intended to control decisions in later situations' may, in some circumstances, give rise to municipal liability under § 1983." Bryan County, 520 U.S. at 406, 117 S.Ct. 1382 (quoting Pembaur v. Cincinnati, 475 U.S. 469, 481, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)).[9] The culpability element, which may overlap with proof of a policy, requires evidence that "the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." Brown, 520 U.S. at 407, 117 S.Ct. 1382 (citation omitted). " 'Deliberate indifference' is a stringent standard, requiring proof that a municipal actor disregarded a known or obvious consequence

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9. That the legal meaning of the term "policy" encompasses a range of municipal behavior can be found in Monell. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible." 436 U.S. at 694, 98 S.Ct. 2018 (emphasis added).

of his action." Id. at 410, 117 S.Ct. 1382. The causation element demands that the plaintiff show that the objectionable municipal policy was the "moving force" behind the plaintiff's injury. Id. at 408, 117 S.Ct. 1382. See also City of Canton, 489 U.S. at 388, 109 S.Ct. 1197 (1989) (same).

A

1

Based on the way the parties present and argue this case on appeal, we focus on whether the failure to provide Burns training as an individual, and not whether the County had a policy of not training its deputies generally.[10] We ask whether there was a decision by a policymaker that can satisfy the first element of ultimately imposing Monell liability. In other words, if Monell liability is to be imposed, it must be done on the grounds of the single decision by Sheriff Moore to require no training of Burns before placing him on the street to make arrests.

Given our standard of review, we think that the jury could have found that the failure to train Burns was a decision that amounted to a County "policy." First, Sheriff Moore was a policy maker who either could require training for Burns or not. Furthermore, Moore's awareness of Burns's youth, inexperience, personal background, and ongoing arrest

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10. Although the County had no formal policy of training for its deputies or reserve officers, the record indicates that Bryan County hired trained and experienced deputies. With respect to reserve officers of Bryan County, the record addresses no failure-to-train situations other than Burns's.

activities while with the department, along with the highly predictable risk of injury from the improper use of force by an untrained officer, provided sufficient notice to Moore of the need to train Burns so as to make his failure to require training a conscious decision.

Our conclusion in this respect stems from the following evidence. First, the jury reasonably could have attached some significance to the fact that Burns was kin to Sheriff Moore. This relationship, along with the fact that the sheriff's department had relatively few officers, makes it highly unlikely that Burns was "lost in the crowd," and his training simply neglected. Second, the jury could have reasonably concluded that Moore knew of Burns's immature background. This is a point on which all courts, including the Supreme Court, have overwhelmingly agreed. See Bryan County, 520 U.S. at 414, 117 S.Ct. 1382 (majority opinion) and 520 U.S. at 427-28 and n. 6, 117 S.Ct. 1382 (Souter, J., dissenting). The jury could conclude that this background alerted Sheriff Moore that there was an especially pressing need to train Burns, especially with respect to when and how to use force. Third, Sheriff Moore did not comply with the formal steps necessary to enroll Burns in CLEET training until after the incident, despite statutory requirements mandating him to do so. Thus, the jury could infer that Sheriff Moore knew that Burns was not attending CLEET, and conclude that Sheriff Moore was aware that Burns was all-the-more in need for some training, yet decided not to require training for him. Fourth, despite availability of non-CLEET training options (e.g., the television training network), Sheriff Moore knew that no requirements or enforcement mechanisms existed to ensure that Burns availed himself of

these alternatives. Fifth, Sheriff Moore had authorized Burns to engage in a wide latitude of conduct, with restrictions applied only to his driving and to his ability to carry a gun, knowing he had no training for the duties he might encounter. Sixth, Moore knew Burns had already arrested some individuals, i.e., he was engaging in conduct with the potential for harm and that required training. Burns testified he was authorized by Moore to make arrests. He had participated in twelve arrests prior to the Brown incident. Seventh, Moore knew that there were no formal departmental policies regarding supervision of junior officers to assist Burns or to limit his conduct. Moore admitted that he did not instruct deputies about their responsibilities to supervise a reserve deputy. In sum, we think on this evidence the jury reasonably could have concluded that Sheriff Moore made a conscious decision not to train Burns, yet still allowed him to make arrests.

2

We then turn to address whether municipal liability for failure to train can attach from a single decision of a policymaker. The County insists it cannot.

We think it is clear from the Court's decisions in City of Canton, 489 U.S. at 380 & 387, 109 S.Ct. 1197, and Bryan County, that, under certain circumstances, § 1983 liability can attach for a single decision not to train an individual officer even where there has been no pattern of previous constitutional violations. We therefore turn to consider those two cases.

Appendix A

(a)

In City of Canton, 489 U.S. 378, 109 S.Ct. 1197, a detainee brought a § 1983 suit against the city based on its failure to provide more medical training for a police station shift commander. The detainee alleged deprivation of her constitutional rights when the allegedly undertrained shift commander did not call for necessary medical care when she showed signs of serious illness. The record indicated that the city provided some medically-related training for its officers, including providing first-aid training. 489 U.S. at 391 n. 11, 109 S.Ct. 1197. There was no indication that such incidents were a recurring problem; that is, city liability was asserted on an apparent single incident of citizen injury. The Court, nevertheless, did not reject the plaintiff's failure-to-train claim as the basis for § 1983, but instead vacated and remanded the case for further proceedings on the grounds that the jury instructions fell below the "deliberate indifference" standard of proof required for liability to attach.

In City of Canton, the Supreme Court addressed several issues that are relevant to our consideration of the appeal before us. For the first time, the Court made clear that a municipality could be liable under section 1983 for the implementation of perfectly lawful and constitutional policies when a city employee applied the policy in an unconstitutional manner. Thus, the Court concluded that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under section 1983." 489 U.S. at 387, 109 S.Ct. 1197. The basis for liability under such circumstances, however, is dependent upon the degree of fault evidenced by the municipality's action or

inaction. In this respect, the Court concluded that "the inadequacy of police training may serve as the basis for section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police comes into contact." Id. at 388, 109 S.Ct. 1197.

City of Canton, we think, spoke rather directly to the facts in the case before us when it observed that with respect to specific officers, a need for more or different training can be so obvious and the inadequacy of training so likely to result in a violation of constitutional rights that the city can reasonably be said to have been deliberately indifferent to the need for training. Id. at 390, 109 S.Ct. 1197.

Furthermore, the Court noted that the focus of the inquiry in determining city liability for failure to train must be "on the adequacy of the training program in relation to the tasks the particular officers must perform." Id. at 390, 109 S.Ct. 1197. Here, for example, we must focus on the adequacy of training of Burns in relation to performing in an arrest situation. And City of Canton admonishes that we must examine the evidence for deliberate indifference of the county and not be satisfied with mere negligence in failing to train.

Finally, we think that City of Canton again spoke to the facts in this appeal in footnote ten. There it observed that it is a fact to a moral certainty that police officers are required to arrest fleeing felons. Thus, when the city arms its officers to carry out this task, there is thus the obvious need to train officers in the constitutional limitations on the use of deadly force. This need for training is so obvious that the failure to

train is deliberate indifference to constitutional rights. This same observation, we think, may be applied in making arrests with force.

In sum, for purposes of considering the appeal before us, we draw the following guidance from City of Canton: The failure to train may be actionable under section 1983. Liability of the county depends upon whether it should have been obvious to Sheriff Moore — or stated differently, whether Sheriff Moore had sufficient notice — that the failure to train Burns in his task of making arrests was likely to lead to a violation of the Fourth Amendment rights of those he would encounter. Furthermore, liability attaches only if there is direct causation between the policy and the injury. The City of Canton also suggests that a single incident of an alleged constitutional violation resulting from the policy may serve as a basis for liability so long as that violation was an obvious consequence of the policy. Thus, City of Canton is persuasive that a pattern of misconduct is not required to establish obviousness or notice to the policymaker of the likely consequences of his decision. As Justice O'Connor, the author of Bryan County, observed in her concurring opinion in City of Canton:

> Where a section 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of constitutional rights of their citizens, the dictates of Monell are satisfied.

Id. at 396, 109 S.Ct. 1197.

Appendix A

With City of Canton establishing some key principles for our consideration of this appeal, we now turn to Justice O'Connor's further refinement and development of those principles — particularly as relates to the liability of the county for a single decision by a policymaker — in Bryan County v. Brown, 520 U.S. 397, 117 S.Ct. 1382.

(b)

As we have earlier noted, in Bryan County, considering the same facts in this appeal but in a different light, the Supreme Court reversed the judgment to the extent that an inadequate hiring policy of the county was the basis for liability. The question presented to the Supreme Court was whether Sheriff Moore's decision to hire Burns constituted a policy that, under Monell, could trigger liability against the County. The Court acknowledged that earlier decisions of the Court may have indicated that a single decision attributable to a municipality could hold it liable. It distinguished those cases, however, because they involved formal decisions of municipal legislative bodies. Furthermore, in those cases, fault of the policymaker and causation between the policy and the injury were obvious. Bryan County, however, unlike other cases, presented a different kind of a case where the decision by the county to hire Burns was legal, and it was Burns, the employee, who used the illegal excessive force, and not the County itself. Where the County has not directly inflicted an injury, but the allegation is that the County has nevertheless caused an employee to do so (e.g., by failing to screen or train employees), "rigorous standards of culpability and causation must be applied to assure that the [county] is not held liable

solely for the actions of its employees." Id. at 405, 117 S.Ct. at 1389.

Addressing a case in which a plaintiff attempted to attach liability to a single decision of the county's policymaker, the Court made clear that, when "seeking to establish [county] liability on the theory that a facially, lawful [county] action has led an employee to violate a plaintiff's rights[,] [the plaintiff] must demonstrate that the [county] action was taken with 'deliberate indifference' as to its known or obvious consequences." Id. at 407, 117 S.Ct. 1382 (citing City of Canton). In reference to hiring cases, the Court emphasized that to hold the county liable for a single decision, there must be a high degree of predictability concerning the consequences of the challenged decision. In other words, a plaintiff must demonstrate that the decision in question reflects "deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." Id. at 411, 117 S.Ct. 1382. Specifically, in order to find the county liable for a single decision of the policymaker, there must be evidence that would support a finding that it was obvious that the offending officer in question was "highly likely to inflict the particular injury suffered by the plaintiff." Id. at 412, 117 S.Ct. 1382. Thus, the Court held that to test the link between Sheriff Moore's hiring decision and Jill Brown's injury, the lower courts should have asked whether Sheriff Moore should have concluded that Burns's use of excessive force in making arrests was a plainly obvious consequence of the sheriff's hiring decision. Id. at 411, 117 S.Ct. 1382. The Court went on to hold that the evidence in this case was inadequate to support such a jury finding. In the absence of such a finding,

Sheriff Moore was not deliberately indifferent to the plaintiff's Fourth Amendment rights in hiring Burns. Id. at 414, 117 S.Ct. 1382.

Relative to the judgment we consider today, however, the Bryan County Court distinguished between liability imposed on the basis of a hiring decision and liability imposed on the basis of a county's failure to train. "[P]redicting the consequence of a single hiring decision . . . is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties." 520 U.S. at 410, 117 S.Ct. 1382. Acknowledging that City of Canton condoned municipal liability on the basis a single event of failing to train an employee, the Court rejected Jill Brown's attempt to analogize her hiring claim to failure-to-train cases because of the greater predictability of the consequences that flow from the failure to train an employee. The Court noted that the consequence of failing to train a single law enforcement officer as to a specific skill necessary to discharge his duties is far more predictable than is the consequence of a single hiring decision. Id. at 410, 117 S.Ct. 1382.

Thus, although a hiring claim is clearly barred on the basis of the evidence before us in this appeal, we cannot accept the county's argument that Bryan County is a bar to considering whether the same evidence constitutes a basis for liability against the county under the plaintiff's failure to train claim. Indeed, the Bryan County Court noted that:

> In Canton, we did not foreclose the possibility that evidence of a single violation of federal

> rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential violation for such violation, could trigger municipal liability.

520 U.S. at 409, 117 S.Ct. 1382.

We think the Supreme Court's decision in Bryan County simply makes clear that the evidence must withstand a vigorous test whether a reasonable jury could conclude: first, it should have been obvious to Sheriff Moore that the highly predictable consequence of not training Burns (and not providing supervision over his conduct when making an arrest) was that Burns would apply force in such a way that the Fourth Amendment rights of the citizens of Bryan County were at risk; and, second, that this failure to train or to provide supervision was "the moving force" that had a specific causal connection to the constitutional injury. In short, the evidence must establish, under the stringent standards of the Supreme Court's pronouncements in Bryan County, unmistakable culpability and clearly connected causation.[11]

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11. The County relies heavily on our decision in Snyder, a case that is distinguishable from the facts presented here. The holding of Snyder rested on grounds that the city's policymakers did not have sufficient notice of the stress problem to respond effectively. "There was no evidence showing that the city was aware of the supposedly high stress levels in the NOPD or knew that in the absence of a stress management program was likely to endanger the constitutional rights of its citizens." 142 F.3d at 799. Furthermore, the causal link was absent. "The evidence did not establish even a remote link between the city's failure to enact a stress management program and Snyder's injury." Id. In this appeal, both of these elements are met as we have explained.

We thus conclude that a single decision by a policy maker may, under certain circumstances, constitute a policy for which the County may be liable. We now turn to consider the requirements of City of Canton and Bryan County as they apply to this case.

B

Next, we consider the culpability element necessary to establish the County's liability. We conclude that the County's provision of no training (and no supervision) to Burns, on these facts, constitutes "deliberate indifference" to the health and safety of the citizens of Bryan County.[12]

First, we take it as elemental that police officers need at least some training to perform their job safely and effectively.

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12. The jury instruction stated:

> Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional training policy if in light of the duties assigned to Deputy Sheriff Stacy Burns the need for more or different training was so obvious and the inadequacy so likely to result in violations of constitutional rights, that Sheriff B.J. Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

By implication, the Court approved this instruction in Bryan County. 520 U.S. at 411, 117 S.Ct. 1382. That this finding was not a de facto finding of negligence may be inferred from the jury's additional finding, Interrogatory No. 9, that the County was also negligent in the training of Burns.

Here, the evidence, including the expert testimony, supported this proposition. The jury was therefore justified to conclude that it was obvious to Sheriff Moore that officers without any training have a high predictability of injuring citizens, routinely and unnecessarily, through use of improper techniques, improper force, and improper judgment calls. Our review of the record further indicates that the jury reasonably could have concluded that it was obvious new reserve officers, while being trained, require at least minimal supervision.[13]

That the County, through its policymaker, is culpable for purposes of § 1983 for its choice not to train Burns (and not to provide proper supervision for him), is illustrated by the facts giving notice to Sheriff Moore of the need to train and supervise Burns. Again, based on the family connection between Burns and Moore, and Moore's recent investigation of Burns's record, the jury reasonably could have inferred Sheriff Moore had full notice of the full extent of Burns's exuberant and reckless background. The same is true with respect to his record of on-the-job conduct in "taking down" a number of arrest subjects. On the stand, Burns admitted that, out of his twelve arrests, he had forced three or four individuals "to the ground," that is, between twenty-five and thirty-three percent of the total number of arrests. The

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13. Indeed, Oklahoma law would appear to require this supervision. See Op. Atty. Gen'l No. 85-46 (1985) (" 'A sheriff or salaried deputy sheriff shall accompany a reserve force deputy sheriff in the performance of all duties assigned to such reserve force deputy sheriff unless such reserve deputy has completed the required one-hundred-twenty-hour basic police course.' ") (quoting Okla. Stat. Ann. tit. 19 § 547(B)).

plaintiff's expert testified this record was excessive. At minimum, this record should have provided notice to Sheriff Moore that Burns was making arrests and using force on a regular basis. The County's sheriff force consists of only six regular deputies, and Burns had been on duty only four to five weeks. The jury could have reasonably believed that Sheriff Moore was aware of what Burns was doing in the field and knew training was required for Burns to perform such tasks. These facts bear on the high predictability of citizen injury by the untrained Burns and reinforce the jury's finding of deliberate indifference in this case.

The same observations apply to the facts showing no supervision of reserve officers. As we have discussed, the jury reasonably could have found that Burns remained, essentially, unsupervised. Sheriff Moore testified he did not authorize Burns to make arrests, and that he limited Burns's authority by refusing to allow him to carry a gun or drive while on duty. Moore also testified that he intended that Burns be supervised by a full-fledged deputy. Other testimony contradicted Sheriff Moore's claims with respect to proper supervision. First, Sheriff Moore could point to nothing to prove a policy of supervision except his assertion that such responsibility was "common knowledge." Morrison, the deputy accompanying Burns, testified that he had never been given any instructions from the Bryan County Sheriff's Department as to how he should work with a reserve deputy. When cross-examined in reference to his testimony that he told Burns about his limited authority to make arrests, Sheriff Moore could say only that, "[h]e knowed it." Burns stated that Moore's only limitations on his activities were not being allowed to carry a gun or to drive a police car.

Indeed, Burns testified that Sheriff Moore had authorized him to engage in arrests. Burns testified that he believed he had authorization from Moore to participate in the acts involved in the Brown pursuit and arrest, including use of the arm bar technique. Sheriff Moore did not inform the deputy accompanying Burns that Burns was limited in his authorization. At minimum, the policy of not supervising inexperienced officers could reasonably lead the jury to conclude that the failure to train made the County even more culpable for the constitutional injuries that followed.

Thus, we think the jury reasonably could have concluded that it was obvious to Sheriff Moore that his policy decision not to train Burns would result in a constitutional deprivation. As a law enforcement officer, Sheriff Moore knew that all law enforcement officers, unless expressly restricted, will face situations calling for the application of force. The jury reasonably could have found that with Burns there was an even greater magnitude of obviousness of the need for training and predictability of the consequences without training—rendering the degree of the County's culpability for the actions of Burns very high indeed. In short, given the evidence that provided notice to Sheriff Moore of the highly predictable consequences of not training Burns — i.e., his youth, his personal record of recklessness and questionable judgment, his inexperience, and his exuberance as a reserve deputy in the short time he had been on the force, and knowledge that forcible arrests were inevitable for a law enforcement officer — Sheriff Moore's considered policy decision not to require training for Burns can be said to constitute "deliberate indifference" to the Fourth Amendment rights of those citizens Burns would encounter.

Appendix A

C

Having concluded that the evidence supports a finding that Sheriff Moore consciously failed to train Burns, and having concluded that such a policy decision was the result of deliberate indifference to the rights secured under the Fourth Amendment, we now turn to consider whether there is sufficient causation between the policy decision and the injuries Jill Brown suffered to hold the County liable for those injuries.

Our review of the record convinces us that the jury had before it substantial testimony that much of the officers' conduct, and Burns's conduct in particular, during the incident was contrary to professional standards. According to the expert testimony, Burns violated basic standards of police conduct, standards that would have been taught Burns in any basic police training. The jury could have drawn inferences that the failure to have trained Burns to follow professional police standards was the moving force causing Brown's injuries. Specifically, on the evidence before it, the jury could have concluded that the County, abetted by its policy of failing to supervise untrained deputies, allowed Burns to participate in the pursuit and arrest of Brown and that his lack of training in safety precautions and in arrest situations and in actually making the arrest, was the "moving force" that caused the injuries inflicted upon her.

As a preliminary matter, the jury heard expert testimony that the pursuit across state lines and the method of the stop were extraordinary and contrary to professional standards when the officers had no reason to suspect a felony violation.

Indeed, the defendants admitted that they did not suspect any felonious behavior. Next, the testimony showed that the positioning of the patrol car vis-á-vis the Browns' pickup truck after the stop was highly unusual. Instead of positioning themselves in front of or behind the Browns' truck, Officer Morrison pulled alongside of it, a position labeled by the County's own expert as improper because it placed the officers in peril.

There was further expert testimony that Burns's subsequent actions demonstrated a lack of knowledge of basic police tactics. First, without pause and without ascertaining the Browns' intent, Burns immediately exited the patrol car and approached the Browns' vehicle. Instead of moving behind the truck, he crossed in front of the truck. In doing so, not only did he cross through Officer Morrison's line of fire, but during his approach to the passenger side of the Browns' truck he exposed himself to any risk the Browns may have posed. Third, testimony suggested that, despite the lack of light, Burns may not have used his flashlight to illuminate Ms. Brown. Thus, he could not see with any clarity what she was doing in the truck cab.[14] Officer Morrison, however, testified that the Browns both raised their hands when so instructed. Fourth, Ms. Brown testified that Burns

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14. The two experts concurred that a subject may be slow to exit a vehicle for various reasons, e.g., he or she just woke up, does not speak English, suffers a mental deficiency, or is scared. Even if we viewed the evidence in a light most favorable to Burns, i.e., Brown was slow to exit the vehicle, the jury could have believed that Burns overreacted to the situation. The training deficiency may have had a direct causal relationship to Burns's actions that evening, according to Brown's expert.

exposed himself to further danger by reaching across her to unbuckle her seat belt. Fifth, the risk Burns posed to Brown was aggravated by the officers' perception of a high-speed chase, when the danger of harm to officer and citizen as a result of lack of training is especially grave.[15] Indeed, the experts implied that the combination of a potentially dangerous situation and Burns's lack of a firearm may have led to his overreaction if Burns felt at risk, but did not have the proper tools to protect himself. The jury could reasonably have inferred that all of these enumerated professional failures on Burns's part, errors that were inconsistent with police training, created a situation that provoked a degree of fear for his safety, which prompted him to overreact. The jury reasonably could have inferred from the testimony, that with proper training Burns would have suggested that legitimate reasons existed to explain why an individual may be slow to exit a vehicle and thus Burns would not spontaneously have felt compelled to use force on someone who was offering no resistance. Finally, the absence of training is reflected in the injury that resulted to Brown, an injury that stemmed from what the testimony suggested is an extraction technique involving, properly applied, a minimum use of force. The jury could have reasonably concluded that, with training, Burns would have used the "arm bar" technique in a manner so as not to inflict injury.

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15. The plaintiff's expert testified that "the literature and personal experience indicate that the time at which the high-speed pursuit is terminated . . . and the officers exit the vehicles is the critical point at which there is a high likelihood or possibility for excessive use of force. . . . That's a particular and critical time for supervision and properly trained." [sic]

The jury could have also concluded that the County's policy of not providing proper supervision, a component of the County's policy of no training (beyond the possible availability of CLEET), contributed to the causal force behind the constitutional deprivation suffered by Jill Brown. The evidence supports a conclusion that Burns was unsupervised and unarmed throughout the incident. His decision to join Morrison was his personal decision, made without supervisory approval. Officer Morrison himself stated that he was not in charge of Burns that evening. Morrison admits he gave Burns no explicit instructions before or during the episode. Burns testified that he received none. Given Burns's lack of training and lack of protection in the form of a sidearm, Ms. Brown's expert testified that Burns should never have been permitted to leave the vehicle. Morrison allowed Burns to exit the vehicle, even though Morrison testified that he himself was in "great fear," and drew his weapon. Morrison knew that Burns did not have a gun. If there was a training program, according to the expert testimony that the jury could have believed, Morrison likely would have ordered Burns to remain in the patrol car. Finally, according to Brown's expert, the discovery record indicates a total absence of any communication or coordination between Morrison and Burns during the entire incident. The County's expert found fundamental fault in the supervisory relationship during the incident, a fault that contributes to the consequences of the lack of training.

In sum, the jury reasonably could have concluded that the County's decision not to train Burns, compounded by its policy of not requiring proper supervision, was the "moving force" behind the unconstitutional use of excessive force, which caused Brown's injury.

D

We sum up. Given our standard of review, we conclude that the evidence in the record allowed the jury reasonably to find that Sheriff Moore made a conscious decision not to train Burns, that because the need to train Burns was obvious, the failure to train him constituted "deliberate indifference" to the constitutional rights of the citizens of Bryan County, and that this decision was the "moving force" behind Brown's injuries. We therefore conclude that the decision not to train Burns was a policy choice on which § 1983 liability can lie. Thus, the district court properly denied the County's motion for judgment as a matter of law.[16]

V

On cross-appeal, Jill Brown challenges the district court's decision not to enter judgment in accordance with the jury's verdict on lost income and lost earning capacity, as well as for abstract constitutional injuries she suffered. The jury awarded Brown $36,000 for lost income and $180,000 for lost earning capacity, and $100,000 in damages for her constitutional injuries. In this respect, the County never raised any objection to her evidence, did not object to the jury's charge, and did not raise any objection to those damages in any postjudgment motions. Despite this lack of objection by the County, the district court, sua sponte, as it had done in its first entry of judgment, again entered

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16. Having found that § 1983 liability was properly imposed in this case, we need not reach Brown's state law claims, which are duplicative of the federal claims we have decided.

judgment upon our remand that struck Brown's economic damages and reduced her constitutional damages to a nominal $1.00. Brown asks us to review these alleged errors of the district court and to restore these damage awards.

Because Brown failed to object to these reductions made by the district court, we consider the district court's rulings under a plain error standard. We have defined "plain error" to mean "unobjected-to (forfeited) errors that are plain ('clear' or 'obvious') and affect substantial rights. . . . [W]e 'should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.' " Douglass v. United Servs. Automobile Assn., 79 F.3d 1415 (5th Cir.1996) (quoting United States v. Olano, 507 U.S. 725, 732-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)); United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir.1994) (en banc). See also Johnson v. United States, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997):

> Under [the plain error] test, before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

(Alterations in original.) The Supreme Court has explained these terms to the extent that (1) "clear" means "the error is

clear under current law," Olano, 507 U.S. at 734, 113 S.Ct. 1770, and that (2) "affects substantial rights" means that "the error must have been prejudicial: It must have affected the outcome of the district court proceedings." Id.

A

The district court's ruling on economic damages for lost income and earning capacity must be reversed.[17] Although Brown failed to preserve this error by a proper objection, we think the district court's ruling constitutes plain error.[18]

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17. As we have indicated, on this second entry of judgment, after our remand, the district court struck, as it had done before, the verdict for damages for lost wages and future income. In our consideration of this question in the first appeal, we cited McCann v. Texas City Refining, Inc., 984 F.2d 667, 672 (5th Cir.1993), and recognized that the district court's sua sponte reduction of the verdict was "constitutionally impermissible," 67 F.3d at 1182, in that the County never made the proper objection in any preverdict or postverdict motion (that is, an objection on the specific ground that the evidence was insufficient to support this portion of Brown's damage award). We considered, however, the district court's reduction under the plain error standard because of Brown's failure to object to the district court's post-verdict action. Thus, we reviewed the evidence offered by Brown and concluded that the district court was correct that Brown's evidence of damages was "lacking." Without citation to authority, we stated, "the issue is not whether any evidence exists to support the jury verdict. Instead, the issue is whether the district court's action constituted plain error." Id. For the reasons stated here, our previous opinion (now vacated by the Supreme Court) holding that the district court did not err, was incorrrect.

18. In its brief, the County makes no substantive argument for the district court's striking the damage award for lost income and

(Cont'd)

In Morante v. Am. Gen'l Fin. Center, 157 F.3d 1006 (5th Cir.1998), we said:

> It is well-settled in this circuit that a motion for judgment as a matter of law filed post verdict cannot assert a ground that was not included in the motion for judgment as a matter of law made at the close of the evidence. See Allied Bank-West, N.A. v. Stein, 996 F.2d 111, 115 (5th Cir.1993) (explaining that under Rule 50, a motion for directed verdict is a prerequisite and "virtually jurisdictional" so that a motion for JNOV cannot assert a ground that was not included in the motion for directed verdict). See also Perricone v. Kansas City Southern Ry. Co., 704 F.2d 1376, 1380 (5th Cir. 1983). In Sulmeyer v. Coca Cola Co., 515 F.2d 835, 846 n. 17 (5th Cir.1975), this court explained that "[i]t would be a constitutionally impermissible re-examination of the jury's verdict for the district court to enter judgment n.o.v. on a ground not raised in the motion for directed verdict."

(Alteration in original.) See also WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2537, p. 349 & § 2540, pp. 368-69 (West 1995). Therefore, there is no doubt that district court's "constitutionally impermissible"

(Cont'd)
lost earning capacity. It insists only that the prior panel opinion is "the law of the case." As we have earlier noted, the law of the case does not apply in this case where the Supreme Court has vacated the judgment.

action, exercised once again on remand, constitutes an error that was clear, or obvious, under existing precedent in this circuit. Second, the error unquestionably affected substantial rights because it affected the outcome of the proceedings, i.e., it reduced the judgment to Brown by a substantial amount. Lastly, we must conclude that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." We reach this conclusion because the district court's sua sponte action constituted an unconstitutional invasion of those issues that are reserved for the jury's consideration in violation of Brown's Seventh Amendment rights because Brown introduced some evidence of her injuries justifying submission of the issue to the jury;[19] and,

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19. Our decision here differs with the conclusion we reached on prior consideration because, there, we applied an improper evidentiary test to this reduction. This case presents the rare instance of a district court's sua sponte action without a defendant's sufficiency of the evidence motion. Usually, plain error is applied when the defendant on appeal argues that, despite its failure to object below, there is insufficient evidence to support the judgment. The question the appellate court must ask is whether the plaintiff presented any evidence to support the verdict. See Sharp v. City of Houston, 164 F.3d 923, 932 (5th Cir.1999) ("Under the plain-error review, the inquiry is whether the plaintiff has presented any evidence in support of his claim."); Polanco v. City of Austin, 78 F.3d 968, 974 (5th Cir.1996); McCann, 984 F.2d at 673 ("[T]he question before this court is not whether there was substantial evidence to support the jury verdict, but whether there was any evidence to support the jury verdict."). See also Childress & Davis, Federal Standards of Review, Vol. I, 3d ed. (LEXIS 1999), § 3.15, pp. 3-115-3-119. The prior panel, however, engaged in a weighing of the evidence, upholding that the district court's conclusion that the evidence offered by Brown was "lacking" in sufficiency. That was an incorrect approach.

second, the court ruled based on an unargued, uncontested view of the evidence on which "the nonmovant has [not] had the opportunity to cure any insufficiencies." See Purcell v. Seguin State Bank and Trust Co., 999 F.2d 950, 956 (5th Cir.1993) (explaining purposes of Rule 50 motion). Thus, under the authority cited above, we hold that the district court committed plain error when it reduced the jury's verdict for lost wages/earning capacity damages in the absence of a proper and timely motion from the defendant.

B

We now consider the district court's reduction of the $100,000 the jury awarded to Brown as damages for deprivation of her constitutional right not to be subjected to excessive force ($50,000) and for her loss of liberty ($50,000). We have reviewed the district court's Judgment, March 31, 1998 Order, and supporting June 22, 1998 Memorandum Opinion and Order. We find that the decision to strike the $100,000 damage award for violation of Brown's constitutional rights does not constitute plain error. The only error the district court made in this respect was submitting this issue to the jury.

Under clearly established jurisprudence, "the abstract value of a constitutional right may not form the basis for § 1983 damages." Memphis Community School Dist. v. Stachura, 477 U.S. 299, 308, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986). See also id. at 306-06, 106 S.Ct. 2537; Hay v. City of Irving, Texas, 893 F.2d 796, 800 (5th Cir.1990). Therefore, this damage question should never have been submitted to the jury and no argument can be made that the

district court infringed upon Brown's Seventh Amendment rights by taking the matter from the jury post-verdict. As there was no basis for the award, this verdict represents a windfall to which Brown is not entitled. Therefore, this reduction does not affect the substantial rights of Brown. Consequently, the integrity of the proceedings was not affected by the district court's action; indeed, to allow it to stand would be to affect seriously the integrity of the judicial proceeding. Thus, we affirm the judgment in this respect.

We therefore will reinstate the reductions in the jury verdict only with respect to Brown's lost income/earning capacity damages.

VI

The County also claims that the district court erred by failing to offset Brown's recovery by $5,001.75 that the Supreme Court awarded to the County as costs. Brown does not respond to this argument in her brief. Those costs may be offset against Brown's recovery.

VII

In sum, we hold that on the facts of this case, the district court properly rejected the County's motion for judgment as a matter of law on Brown's § 1983 failure-to-train claim. We affirm the district court's elimination of Brown's award for those intangible damages she suffered because of the County's violation of her constitutional rights. We reverse, however, the district court's decision to cut Brown's damages for lost income and earning capacity. Otherwise we affirm

the award of all other sums to Brown as damages and fees.[20] We offset Brown's award by any costs awarded to the County by the Supreme Court.

VIII

For the reasons we have stated in this opinion, the judgment of the district court is affirmed as modified in accordance with this opinion and

REMANDED to the district court for entry of judgment consistent with this opinion

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20. The jury also awarded Brown damages for past physical pain ($5000), future physical pain ($10,000), past mental pain and anguish ($1,000), future mental pain and anguish ($1,000), past physical impairment ($75,000), future physical impairment ($300,000), past disfigurement ($1,000), future disfigurement ($2,000), damage to reputation ($500), past medical expenses ($65,802), and future medical expenses ($90,000). The jury also awarded Brown $20,000 in punitive damages, to be recovered from Stacy Burns. Finally, the jury awarded Brown $77,500 in attorneys' fees. The district court ordered all sums to be subject to post prejudgment and post-judgment interest.

Appendix A

DeMOSS, Circuit Judge, dissenting:

This appeal is the latest in a series of appeals which deal with the same factual and legal claims between the same parties. For ease of reference, these are defined as follows:

(1) Brown v. Bryan County, 53 F.3d 1410 (5th Cir.1995) (hereinafter "Brown I")

(2) Brown v. Bryan County, 67 F.3d 1174 (5th Cir.1995) (hereinafter "Brown II")

(3) Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (hereinafter referred to as the Supreme Court decision in Brown)

(4) Brown v. Bryan County, 219 F.3d 450 (5th Cir.1999) (hereinafter Brown III or the current appeal).

My review of the history of this long-term, complicated, and at times acrimonious litigation has persuaded me that our Court has made some errors in processing these appeals which deserve recognition and correction as part of the resolution of the current pending appeal.

My concerns relate to the confusing and anomalous treatment of the claims of liability against Bryan County (the "County") under § 1983 which is reflected in these various opinions. Here are the specifics.

In Brown I, the original panel of this Court discussed the liability of Bryan County in Part VI of that opinion. In

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Part VI(A), a majority of the panel determined that the jury findings supported a determination of liability on the part of Bryan County because Sheriff Moore's decision to hire Burns without proper investigation amounted to deliberate indifference to the public welfare. In Part VI(B), the original panel unanimously determined that no recovery against Bryan County could be based on the theory of failure to properly train Burns after hiring because our Circuit's clear precedents require more than a single instance of injury or an isolated case of one poorly trained employee for municipal liability to attach. Judge Emilio Garza dissented on the basis that liability against Bryan County could not be sustained because one inadequate background investigation, even by a municipal policy maker, is not enough to constitute "the unconstitutional municipal policy" contemplated by Monell.

Following issuance of this opinion on June 2, 1995, another judge of this Court held the mandate and initiated correspondence with the original panel because the portion of Brown I holding the County liable was in conflict with a prior decision of this Circuit in Stokes v. Bullins, 844 F.2d 269 (5th Cir. 1988). Also, Bryan County filed a motion for panel rehearing and a suggestion for en banc reconsideration as to the portion of Brown I which held the County liable for an inadequate hiring policy. Mrs. Brown did not file any motion for panel rehearing or en banc reconsideration.

Considerable exchange of memoranda finally resulted in a decision by the original panel in October 1995 to rewrite its opinion and substitute a new opinion, Brown II, for Brown I. Apparently, the purpose of this rewrite was to minimize the "en banc worthiness" of the new decision by

making clear that the affirmance of the County's liability was based on the particular factual determinations by the jury relating to the inadequacies of the investigation and the inappropriateness of Burns' prior "criminal" record. In accomplishing the rewrite, however, all of Part VI(B), which determined that the County was not liable on any failure-to-train theory, was omitted.

I have not found any indication in the record to suggest that Part VI(B) was intentionally omitted in the redrafting which produced Brown II. I have great difficulty in understanding why Part VI(B) was omitted and have concluded that it must simply have been an inadvertent omission. Clearly, the text of Part VI(B) of Brown I was a completely accurate summary of our Circuit's law on failure-to-train cases; and so far as I can tell, no party nor any judge on our Court raised any question as to the validity or accuracy of that text. If Part VI(B) had been left in Brown II, Mrs. Brown would have had an occasion to file a motion for panel rehearing or en banc reconsideration as to that issue. And failing relief by rehearing or en banc reconsideration, Mrs. Brown would have had an opportunity to apply for a writ of certiorari to the Supreme Court as to the correctness of the decision in Part VI(B) regarding the County not being liable for failure-to-train.

I note that in both Brown I and Brown II there is a short paragraph following the title "DISCUSSION" which includes the following sentence in both opinions: "For efficiency's sake, we will address only those points that we believe merit review." Obviously, in Brown I the panel felt the discussion in Part VI(B) merited review because Part VI(B) dealt with

a theory of recovery which was actually tried before the jury, and as to which Bryan County preserved error in the district court, and the topic was fully briefed on appeal. Why the original panel determined that Part VI(B) no longer merited review in the redrafting which produced Brown II is truly a puzzle to me.[1]

After issuance of Brown II, our Court voted not to give en banc reconsideration to this appeal, and Bryan County applied for a writ of certiorari to the Supreme Court which was granted. In its opinion, the Supreme Court noted:

> The [Fifth Circuit] court held, among other things, that Bryan County was properly found liable under § 1983 based on Sheriff Moore's decision to hire Burns. The court addressed only those points that it thought merited review; it did not address the jury's determination of county liability based on inadequate training of Burns, nor do we. We granted certiorari to decide whether

1. It occurs to me that the original panel majority may have assumed that (i) en banc reconsideration of its affirmance of County liability on the improper hiring theory was so unlikely and (ii) a writ of certiorari from the Supreme Court on this same issue was likewise so unlikely that discussing an alternative theory of liability (i.e. failure-to-train) was simply not worth the paper it would be written on. If so, this case is a clear demonstration of the risks of assuming what a higher court will do. Surprise, surprise, the Supreme Court not only granted certiorari. but reversed the district court and our Court by holding that the jury instructions on improper hiring were not adequate and that the evidence was not sufficient to support the necessary findings — the very aspects which the panel majority thought would insulate this case from further review.

> the County was properly held liable for respondent's injuries based on Sheriff Moore's single decision to hire Burns. We now reverse.

Brown, 520 U.S. at 402, 117 S.Ct. at 1386-87 (citations omitted) (emphasis added). The Supreme Court vacated the judgment of the Fifth Circuit and remanded the case "for further proceedings consistent with this opinion." Id. at 415, 117 S.Ct. at 1394. When this appeal arrived back in our Court, the original panel promptly remanded it to the district court, and in so doing, I think the original panel clearly erred. In my view, upon remand from the Supreme Court, the original panel should have taken two steps:

a. First of all, the panel should have determined the portions of Brown II which had not been reversed by the Supreme Court. Clearly, the portions of Brown II which discuss the liability of Reserve Deputy Burns individually and the quantum of damages had not been changed in any way by the Supreme Court decision, and an order affirming the district court's determination of liability against Deputy Burns individually and the quantum of damages resulting therefrom could have and should have been issued to effect a final disposition thereof; and

b. The original panel should have determined the question of whether or not the County could be liable on a theory of failure-to-train Deputy Burns. As indicated earlier, the theory of failure-to-train had been actually tried to the jury, error in regard thereto had been preserved by the County, the theory had been briefed and argued on appeal, and the original panel had in fact decided that our Circuit

law would not permit such a recovery in Part VI(B) of Brown I. In my view, our Court has a clear duty to decide all issues raised on appeal; and deciding not to decide (or inadvertently failing to decide) is just as big an error as deciding contrary to existing case law precedent in our Circuit.

Given the settled status of our Fifth Circuit case law on the failure-to-train theory, I think the original panel clearly should have issued a supplemental opinion holding that recovery against Bryan County could not be made on the failure-to-train theory; and in view of the Supreme Court decision holding that Bryan County could not be held liable on the improper hiring theory, the original panel should have instructed the district court to enter a judgment that Mrs. Burns take nothing from Bryan County under § 1983. Obviously, that supplemental holding could and probably would have been the subject of an application for writ of certiorari by Mrs. Brown to the Supreme Court. If certiorari had then been granted, the Supreme Court would have then had the occasion to expressly state what distinctions, if any, there may be between the improper hiring theory and the failure-to-train theory insofar as County liability is concerned.

Instead of taking either of the steps suggested in the preceding subparagraphs, the original panel simply entered an order remanding this appeal to the district court "for consideration in conformity with the opinion of the Supreme Court." Brown v. Bryan County, 117 F.3d 239, 240 (5th Cir.1997). When the case got back to the district court, each side promptly filed motions for judgment as a matter of law. No further evidence or testimony was presented by either

party. The district court, therefore, had no evidence before it which it did not have at the time of the original trial four years earlier. The only new thing which the district court had after remand which it didn't have at the time of the original trial was the Supreme Court decision in Brown itself and the rather disingenuous arguments made by counsel for Mrs. Brown that this Supreme Court decision cast a whole new light on the question of municipal liability in failure-to-train cases. This argument was made in the face of the express statement by the Supreme Court that it was NOT addressing a failure-to-train claim in its opinion. When the Supreme Court says it is not addressing a claim in its opinion, I think we should take them at face value and not allow extrapolations of dicta in that opinion to have any effect on the status of our Circuit's settled law — i.e., in this case that failure-to-train claims require a pattern or history of other incidents to support deliberate indifference on the part of the municipality.

Not surprisingly, the district court again found that the evidence was sufficient to support the jury's finding of liability on the failure-to-train theory. I am disturbed by the facility with which the district court simply ignored what was then the most recent decision of our Circuit reaffirming and reapplying the rule that a failure-to-train claim had to be based on more than one instance. See, Snyder v. Trepagnier, 142 F.3d 791 (5th Cir.1998), cert. granted, 525 U.S. 1098, 119 S.Ct. 863, 142 L.Ed.2d 716, cert. dismissed, 526 U.S. 1083, 119 S.Ct. 1493, 143 L.Ed.2d 575 (1999). As a result, the more or less automatic and unstructured remand by the original panel to the district court proved to be not only a terrible waste of judicial resources and duplication of

effort, but also provided Mrs. Brown with a dramatic "second bite at the apple" on her liability claims by permitting a reassessment of the failure-to-train theory by the same district judge whose holding on that same issue was determined to be inconsistent with Fifth Circuit precedent by Part VI(B) of Brown I.

Bottom line, it seems to me that the best way to extricate this Court from this convoluted mess is simply to "fess up" that the original panel inadvertently omitted Part VI(B) in the redrafting between Brown I and Brown II and that upon remand from the Supreme Court, the original panel inappropriately remanded to the district court without first deciding the issue of liability on the failure-to-train theory which was appropriately before it. The solution then is for this present panel to do now what the original panel should have done upon remand from the Supreme Court, i.e., issue a supplemental decision which (i) reaffirms the decision of the district court assessing liability against Deputy Burns individually and fixing damages as determined by the district court; (ii) reverses the decision of the district court as to liability on the part of Bryan County on the theory of failure-to-train; (iii) recognizes that the Supreme Court has determined that liability upon Bryan County for improper hiring is not supportable factually or legally; and (iv) directs the district court to enter judgment that Mrs. Brown take nothing from Bryan County under her claims for deprivation of constitutional rights under § 1983.

Obviously, the foregoing analysis has fallen on the deaf ears of the current panel majority. In their haste to find a "deep pocket" from which Mrs. Burns may recover the

compensation determined by the district court, the current panel majority articulates a variety of new theories with which I must, respectfully, disagree. First and foremost, the current panel majority overstates the impact of the Supreme Court decision in Brown on the decision of this Court in Brown II. Second, the current panel majority ignores the clear line of Fifth Circuit precedent which establishes the criteria necessary to establish municipal liability for failure-to-train. Finally, the current panel majority misapplies dicta in the Supreme Court decision on the issue of hiring as being controlling on the issue of failure-to-train.

Does the Supreme Court Decision in Brown Vacate the Entirety of the Fifth Circuit Decision in Brown II?

After our circuit issued its opinion in Brown II, the only party to apply for writ of certiorari to the Supreme Court was Bryan County which asked for a review of the holding in Brown II that it was liable under § 1983 for inadequate hiring decisions. Deputy Burns did not ask for a writ of certiorari on the portion of Brown II which affirmed his liability under the jury verdict for wrongful arrest and use of excessive force. Mrs. Burns did not apply for a writ of certiorari on the portion of Brown II which affirmed the district court's determination of the quantum of damages. The Supreme Court granted certiorari as to the writ requested by Bryan County and determined that the district court and our court had erred in finding that Bryan County was liable under Section 1983 for "Sheriff Moore's single decision to hire Brown." Accordingly, the Supreme Court decision in Brown concludes with the following statement:

> We therefore vacate the judgment of the Court of Appeals and remand this case for further proceedings consistent with this opinion. 520 U.S. at 415, 117 S.Ct. at 1394.

The current panel majority in this appeal concludes, as indicated by footnotes 1 and 17 of the majority opinion, that this ending direction from the Supreme Court is a complete vacatur of the entirety of this Court's decision in Brown II and that, consequently, Brown II no longer constitutes "the law of the case" in any respect. In support of this conclusion, this current majority relies upon quotations from two Supreme Court cases in footnote 1. Standing alone, these quotations seem to support the majority's position, but when read in the context of the cases from which they are taken, it is obvious that these two quotations were part of larger directives being issued by the Supreme Court in those cases, which required the remanding of those cases to the lower courts for consideration of events that had occurred while those particular cases were on appeal. In effect, the current panel majority attempts to draw a general rule out of specific directions issued in cases which are totally different from Brown from a procedural standpoint.

It seems axiomatic to me that since neither Deputy Burns nor Mrs. Brown attempted to appeal from the decisions in Brown II, relating to Deputy Burn's liability and the quantum of damages, those parts of Brown II would clearly become final and constitute law of the case, if not res judicata, as to those matters. Consequently, our original panel erred when it decided to remand this case to the district court without specifying that such matters were not to be reopened. In point

of fact, the district court seems to have assumed that these matters were law of the case, for in issuing its new opinion on remand, the district court spoke only as to the liability of Bryan County, and it ended up determining the same quantum of damages that it had determined at the time of the original trial. Consequently, in my view, Mrs. Brown had no basis whatsoever for seeking to reopen the damage determination with the district court, and the current majority errs in deciding to permit reconsideration of that damage determination by the district court and in awarding Mrs. Brown a recovery in a quantum greater than that which she declined to appeal from in Brown II.

In issuing its directive at the end of the majority opinion in Brown, the Supreme Court said absolutely nothing about remanding the case to the district court for "reconsideration by the district court" of any of the issues on appeal in Brown II. The Supreme Court decision dealt solely with the single issue as to which certiorari had been granted, and nothing in the Supreme Court decision in Brown can be deemed a mandate to reopen either the quantum of damage issue or the question of the liability of Deputy Burns.

What Effect Does the Supreme Court Decision in Brown have on the Law Determining the County's Liability under Section 1983 for Failure-to-train?

As indicated earlier in this dissent, the Supreme Court expressly indicated that it was not addressing the theory of County liability based on inadequate training of Deputy Burns because that theory had not been addressed by our Court in Brown II. Despite this express disclaimer, Mrs.

Brown and the majority both urge a reading of the Supreme Court decision in Brown that would clearly authorize a holding of County liability under § 1983 based upon the jury findings and instructions given on the failure-to-train theory in this case. When the Supreme Court expressly says it is not addressing an issue in a case, I think we should be very cautious about drawing inferences and implications on an issue from the text of its opinion. But that is precisely what the majority does. In footnote 12, the majority states that "by implication," the Supreme Court approved the jury instructions given to the jury in this case on inadequate training and cites a particular page in the Supreme Court opinion as authority for this statement. There is absolutely nothing, however, on that page of the Supreme Court opinion in Brown which addresses the jury instruction on "inadequate training." Rather, what is discussed on that page is the jury instruction on the improper hiring theory, which the Supreme Court recognized was "analogous to that reserved in City of Canton," but which the Supreme Court determined on the next page was inadequate and insufficient to properly present the issue of inadequate screening before hiring.

Specifically, the Supreme Court said that the district court's instruction on inadequate screening before hiring was defective because: (1) it did not specify that the applicant being considered "was highly likely to inflict the particular injury suffered by the plaintiff"; and (2) because it failed to require a finding that Burn's background "made his use of excessive force in making an arrest a plainly obvious consequence of the hiring decision." Brown, 520 U.S. at 412, 117 S.Ct. at 1390.

Appendix A

It will be apparent to anyone reading the Supreme Court decision in Brown that the Court drew certain distinctions between § 1983 liability based upon inadequate screening before hiring and § 1983 liability based upon failure-to-train. It will also be apparent to anyone reading the Supreme Court decision in Brown that the Court concluded that the proof requirements and the jury instruction requirements on inadequate screening before hiring claims should be more stringent than those applicable to failure-to-train claims. Those differing requirements are necessary to:

> (1) Avoid the "danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself"; and
>
> (2) In order to "prevent municipal liability for a hiring decision from collapsing into respondeat superior liability."

Brown, 520 U.S. at 410, 117 S.Ct. at 1391.

But the simple fact that the Supreme Court declined to accept Mrs. Brown's "proffered analogy" between failure-to-train and inadequate screening cases says very little, if anything, about whether the Supreme Court intended to erect a new or different set of criteria for analyzing a failure-to-train theory.

In short, the Supreme Court decision in Brown on the inadequate screening claim, says absolutely nothing about changes in the criteria for analyzing a failure-to-train claim.

Appendix A

Impact of Supreme Court Decision In Brown on Fifth Circuit Precedent Defining Criteria for Failure-to-train

At the time the original panel issued Brown I in this case, this Circuit had a clear and consistent precedent that in order to recover against a municipality under § 1983 on a failure-to-train claim, the plaintiff must establish something more than a single instance of injury or an isolated case of one poorly trained employee. See, e.g., Languirand v. Hayden, 717 F.2d 220 (5th Cir.1983) (holding that in failure-to-train cases, the plaintiff must establish a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct, or that serious incompetence or misbehavior was general or widespread throughout the police force); Rodriguez v. Avita, 871 F.2d 552 (5th Cir.1989) (discussing Languirand and concluding that municipal liability could not be derived from a single incident of improvident discharge of a firearm by an officer); and Fraire v. City of Arlington, 957 F.2d 1268, 1278 (5th Cir.) (holding that, in failure-to-train cases "isolated violations are not the persistent, often repeated constant violations that constitute custom and policy"), cert. denied, 506 U.S. 973, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992). The original panel relied on this precedent in holding in Part VI(B) of Brown I that Mrs. Brown could not recover against Bryan County for failure-to-train. Our Circuit's decision in Languirand was decided before the Supreme Court decision in City of Canton, but it was referred to favorably by the Supreme Court in City of Canton as one of the Circuit cases that establishes the "deliberate indifference" standard for municipal conduct. Rodriguez and Fraire were decided after

City of Canton. In writing Part VI(B) of Brown I, the original panel expressly referenced the Supreme Court decision in City of Canton and expressly utilized the following quotation from that case:

> That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. . . . Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct.

City of Canton, 489 U.S. at 391, 109 S.Ct. at 1206.

As indicated earlier in this dissent, I recognize that Part VI(B) of Brown I was inadvertently omitted in the rewrite that produced Brown II. As indicated earlier in this dissent, I recognize that Part VI(B) of Brown I, in which a majority of this Court held that the same evidence before the Court in this appeal failed to establish the County's liability for failure-to-train, was inadvertently omitted in the rewrite that produced Brown II. But our Circuit has traditionally followed a rule of orderliness that a subsequent panel may not reach a decision inconsistent with the decision of a prior panel unless there has been an en banc decision of our Court or a Supreme Court decision to the contrary. See, e.g., Grabowski v. Jackson County Pub. Defenders Office, 47 F.3d 1386, 1398-1403 (5th Cir.) (Smith, J., concurring in part and dissenting in part), vacated for reh'g en banc, id. at 1403, district court

judgment aff'd, 79 F.3d 478 (5th Cir.1996) (en banc); see also Arnold v. U.S. Dep't of Interior, 213 F.3d 193, 197 (5th Cir.2000); Teague v. City of Flower Mound, 179 F.3d 377 (5th Cir.1999); Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242, 247 (5th Cir.1997).

Likewise, our Circuit also has a policy that requires a subsequent panel to give deference under the law of the case doctrine to a holding of a prior panel in the same case. See, e.g., Beets v. Johnson, 180 F.3d 190 (5th Cir.1999) (applying law of the case doctrine to decline reconsideration of an issue decided in a previous appeal), cert. denied, __ U.S. __, 120 S.Ct. 946, 145 L.Ed.2d 822 (2000); Quest Medical, Inc. v. Apprill, 90 F.3d 1080, 1094 (5th Cir.1996); United States v. Singleton, 49 F.3d 129, 134 (5th Cir.); Griffin v. Box, 956 F.2d 89, 93 (5th Cir.1992). The law of the case doctrine should foreclose reconsideration of the quantum of the damages in this case and reconsideration of the issue of municipal liability under § 1983 for failure-to-train in this case. Law of the case is a prudential doctrine — a principle that "issues once decided in a case that recur in later stages of the same case are not to be redetermined." See Jack H. Freidenthal, Civil Procedure § 14.1 (2d ed.1993) (citing Allen D. Vestle, Law of the Case: Single Suit Preclusion, 1967 Utah L.Rev. 1). See generally Lincoln National Life Ins. Co. v. Roosth, 306 F.2d 110 (5th Cir.1962) (en banc). "As most commonly defined, the [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983).

Admittedly, both the rule of orderliness and the law of the case doctrine are prudential in nature and do not actually subtract from a court's power to decide. But despite the prudential nature of these rules, this Court has consistently adhered to them. Moreover, while the circumstances in this case which resulted in Part VI(B) of Brown I being dropped out of the original panel's decision in Brown II are somewhat peculiar and anomalous, I think the policies behind these rules justify their application in this case. First of all, the record in this case is identical in all material respects to the record presented to the panel in Brown I and Brown II, which the prior panel found insufficient to establish the County's liability for failure-to-train. Second, the procedural posture of this case is in all material respects identical. While the case has been appealed to the Supreme Court and remanded to the district court, the district court merely entered judgment as a matter of law on the basis of the jury findings without the benefit of any new evidence. Our task, therefore, remains the same as that presented in both Brown I and Brown II, which is to measure the adequacy of the trial record under the controlling legal standards. In this vein, the original panel's determination that the record simply does not measure up may not be binding or mandatory, but I see no basis for saying that the prior work by a three-member panel of this Court in a prior appeal involving the same issues, the same parties, the same record, and the same procedural posture is not entitled to any deference whatsoever. Indeed, such an approach is inconsistent with the prudential rules by which we govern ourselves as a collegiate court.

Unfortunately the current panel majority simply ignores both the existing Fifth Circuit precedent and our prudential

rule of orderliness. In so doing, I think they err grievously. They obviously do not cite any en banc decision of this Circuit which changed or overruled the precedent established by Languirand, Rodriguez, and Fraire. Likewise, the current panel majority does not cite a Supreme Court case which holds that the requirement of our Circuit precedent of a pattern of prior incidents being necessary to establish deliberate indifference on the part of a municipality under § 1983 is no longer the law. Instead, the current panel majority purports to rely upon various portions of City of Canton, particularly footnote 10 of that opinion. But each and every one of those portions of the City of Canton opinion which the panel majority now relies on to support its holding were available for reading and interpretation by the original panel in this case, by the panel in Fraire, and by the panel in Rodriguez.

In short, three panels of this Court have read the very same Supreme Court language and reached the conclusion that municipal liability under § 1983 should not be fixed on the basis of a single incident which is attributable to failure-to-train. The current panel majority, however, reached the opposite conclusion. The panel's reference to footnote 10 is particularly troublesome. In this case, Deputy Burns was not authorized to carry a weapon, and he did not, in fact, carry or use a weapon on the occasion of the arrest involved in this case. There is no testimony in this case which would show that use of the arm-bar take down technique constitutes the use of deadly force. Consequently, this case does not come anywhere near involving the example cited by the Supreme Court in City of Canton as a need for training which is so obvious as to constitute deliberate indifference on the part of the municipality without any history of prior circumstances.

Appendix A

What Impact Does the Supreme Court Decision in Brown Have on The Supreme Court Decision in City of Canton?

Both the current panel majority and Mrs. Brown's brief take the position that the Supreme Court decision in Brown should be read as elaborating upon and extending the holding in City of Canton that an inadequate training claim could be the basis for 1983 liability in limited circumstances. I suggest, however, that the Supreme Court in Brown was actually limiting and restricting the language of City of Canton. Read the following quotation in which Justice O'Connor, speaking for the majority in Brown said:

> We spoke, however, of a deficient training "program," necessarily intended to apply over time to multiple employees. Id. at 390, 109 S.Ct. at 1205. Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action — the "deliberate indifference" — necessary to trigger municipal liability. Id. at 390 n. 10, 109 S.Ct. at 1205 n. 10 ("It could . . . be that the police, in exercising their discretion, so often violate constitutional rights that the need for further

> training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need"); id. at 397, 109 S.Ct. at 1209 (O'CONNOR, J., concurring in part and dissenting in part) ("[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations. . . ."). In addition, the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the "moving force" behind the plaintiff's injury. See id., at 390-91, 109 S.Ct. at 1205-06.

Brown, 520 U.S. at 407-08, 117 S.Ct. at 1390.

Note the repeated emphasis on the word "program" and note the use of the plural form of the words "violations" and "employees," both of which necessarily indicate instances of more than one violation by more than one officer.

Moreover, note the existence of the reference to "existence of a pattern of tortious conduct." Each of these comments by the Supreme Court in Brown demonstrate that what it was saying in City of Canton is that the surest way to establish the required deliberate indifference on the part of the municipality is to prove that its training program has failed to prevent more than one constitutional violation by more than one employee over a period of time, and that such

proof would support a finding of deliberate indifference by the municipality.

Also, in explaining why the analogy urged by Mrs. Brown between failure-to-train cases and inadequate screening cases was not persuasive, the Supreme Court in Brown stated the following:

> In leaving open in Canton the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.

Brown, 520 U.S. at 409, 117 S.Ct. at 1391.

Note, first of all, the characterization of the language in Canton as a hypothesis not a holding. Note next that the Supreme Court in Brown characterized the applicability of the language in Canton as applying to "a narrow range of circumstances," but the Supreme Court in Brown did not add any further examples beyond those already mentioned in City of Canton as to circumstances which would fit in this narrow range.

Finally, note that the Supreme Court decision in Brown, upgraded the probability of a violation of constitutional rights occurring in an improper hiring case from "so likely to

result," as stated in City of Canton, to "highly predictable consequence." These same language distinctions are at the root of the Supreme Court's analysis as to why the jury instructions in Brown on the inadequate hiring issue which was before it were defective. The jury instructions and issues on failure-to-train given by the district court were virtually identical to the jury instructions on inadequate hiring. As I have stated earlier, I do not think the Supreme Court in Brown spoke in any way to the jury instructions and issues on failure-to-train. But since we are now asked to make an educated guess as to what we think the Supreme Court would do with the failure-to-train instructions and jury issues in this case, if, as, and when, those matters get before the Supreme Court, I would put my money on the Supreme Court finding them deficient for two reasons: first, because they inquire about the deficiency of training of an individual, not the deficiency of a training program; and second, because they lack the specificity of constitutional violation and set too low a test of probability just like the issues found deficient by the Supreme Court on inadequate hiring in its opinion.

Conclusion

For all of the foregoing reasons, I respectfully dissent from the analysis and conclusion of the majority opinion. I urge Bryan County to file a motion for panel rehearing and suggestion for en banc reconsideration with respect to the majority's treatment of both the liability and damage issues so that all of the active members of our Court might have an occasion to address the very serious issues raised by the majority's handling of this appeal.

APPENDIX B — MEMORANDUM OPINION AND ORDER AND JUDGMENT ON JURY VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION DATED AND FILED JUNE 22, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:91CV229

JILL BROWN,

Plaintiff,

v.

STACY BURNS and THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Defendants.

MEMORANDUM OPINION AND ORDER

On March 31, 1998, the Court held a hearing on Plaintiff's Motion for Entry of Judgment and Defendant Bryan County's Motion for Judgment as a Matter of Law. After considering the motions, responses, and argument of counsel, the Court entered an Order that Plaintiff's Motion for Entry of Judgment should be granted and Defendant Bryan County's Motion for Judgment as a Matter of Law should be denied. The purpose of this Order is to set forth the reasoning for the Court's decision.

Appendix B

Procedural History

Plaintiff, Jill Brown, brought claims for damages against reserve deputy Stacy Burns ("Burns") and the Board of the County Commissioners of Bryan County, Oklahoma ("Bryan County" or "Defendant") under both Title 42 United States Code, Section 1983 and Oklahoma state law for reserve deputy Burns' alleged use of excessive force when arresting Plaintiff and the alleged injuries that resulted. Plaintiff's Section 1983 claims against Bryan County were premised on the county being liable for the inadequate hiring decision of Sheriff B.J. Moore ("Sheriff Moore"), the county policymaker for the Sheriff's Department, and the inadequate training of Burns by Sheriff Moore. This case was tried with a jury and a final judgment was entered on September 20, 1993. The jury verdict contained findings against Burns and Bryan County on all claims. This Court entered judgment on the jury verdict for Plaintiff, after granting judgment notwithstanding jury verdict with respect to Plaintiff's claims for loss of past income and future earning capacity. Defendants appealed and the Fifth Circuit entered an opinion affirming Plaintiff's Section 1983 inadequate hearing claim. 53 F.3d 1410 (5th Cir.), *withdrawn and superseded*, 61 F.3d 1174 (5th Cir. 1995), *vacated*, 117 S. Ct. 1382 (1997). As to Plaintiff's Section 1983 inadequate training claim, the Fifth Circuit did not affirm, as it required more than a single instance of injury or an isolated case of one poorly trained employee before municipal liability could attach. *Id.* at 1425. However, this opinion was subsequently withdrawn and replaced in toto by an opinion that addressed only Plaintiff's Section 1983 inadequate hiring claim and the Fifth Circuit affirmed on that ground. 67 F.3d 1174 (5th Cir. 1995),

vacated, 117 S. Ct. 1382 (1997). The Fifth Circuit addressed only those points that it thought merited review and did not address Plaintiff's Section 1983 inadequate training claim. Id. at 1178. The United States Supreme Court granted certiorari and addressed only Plaintiff's Section 1983 inadequate hiring claim. The Supreme Court reversed the Fifth Circuit and vacated and remanded for further proceedings consistent with its opinion. 117 S. Ct. 1382, 1387 (1997). The Fifth Circuit remanded to this Court for consideration in conformity with the opinion of the Supreme Court.

The Contentions of the Parties

After remand, both parties filed motions for judgment. Plaintiff seeks judgment on the jury's verdict imposing municipal liability on Bryan County under Section 1983 for inadequately training Burns. Plaintiff contends that in narrow circumstances, a municipality can be liable under Section 1983 due to a single incident involving constitutional violations if the municipality has been "deliberately indifferent" and there is a direct causal link between the municipal action and the violations. Also, Plaintiff seeks judgment on the jury's verdict imposing liability on Burns and Bryan County for Plaintiff's Oklahoma state law claims. On the other hand, Defendant Bryan County requests that judgment be entered as a matter of law that Plaintiff's Section 1983 inadequate training claim fails because there is no evidence of a pattern of widespread conduct, an element Bryan County alleges must exist before a municipality is liable under Section 1983. Additionally, Defendant Bryan County requests the Court to decline to exercise supplemental jurisdiction over Plaintiff's

Oklahoma state law claims, or in the alternative, for the Court to find that Plaintiff's state law claims fail as a matter of law and for insufficient evidence.

Standard for Municipal Liability under Section 1983 based on Inadequate Training

In *Monell v. Department of Social Services of New York*, 98 S. Ct. 2018 (1978), the Supreme Court determined that a municipality can be liable under Section 1983 when the municipality itself causes the constitutional violation at issue. *Id.* at 2037-38. Then, in *City of Canton v. Harris*, 109 S. Ct. 1197 (1989), the Supreme Court specifically addressed whether a municipality can be liable under Section 1983 for constitutional violations resulting from the municipality's failure to train its employees. The Supreme Court established two fundamental requirements for holding a municipality liable under Section 1983 for inadequate training: culpability and causation. First, the municipal policy must have been adopted with deliberate indifference to its known or obvious consequences.[1] *Id.* at 1204. Second, there must be a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. *Id.* at 1203.

While the Fifth Circuit recently stated that "proof of a single violent incident ordinarily is insufficient to hold a municipality liable for inadequate training[,]" *Snyder v.*

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1. Here, Plaintiff's claim of municipal liability is based on the theory that although the municipal policy action, a training program, was lawful on its face, the inadequate training of Burns was obvious to Sheriff Moore, who, nevertheless was "deliberately indifferent" to Burns' need of training.

Trepagnier, No. 96-30935, 1998 WL 268280, at *6 (5th Cir. May 27, 1998), the Supreme Court, as stated in *Bryan County*, "did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Bryan County*, 117 S. Ct. at 1391 (citation omitted); *City of Canton*, 109 S. Ct. 1205, and n.10. Further, the Supreme Court held:

> But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.
>
> . . . .
>
> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, . . . can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for

> further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

City of Canton, 109 S. Ct. at 1205, and n.10.

The Court is persuaded that the evidence in this case supports the jury finding that Bryan County is liable for the inadequate training of Burns. The Court is further persuaded that the holdings of the Supreme Court in *City of Canton v. Harris* and in this case do not foreclose liability of Bryan County. The Court believes that these opinions support liability in this case. Because the Court finds sufficient evidence to support the jury's verdict imposing Section 1983 liability against Bryan County for its inadequate training of Burns, the Court need not address the parties' arguments regarding Plaintiff's Oklahoma state law claims.

Discussion

While Plaintiff acknowledges that the Supreme Court held in this case that a single act will not support Section 1983 municipal liability based on an inadequate hiring claim, Plaintiff urges that *City of Canton* permits a claim of Section 1983 municipal liability based on the inadequate training of a single officer without evidence of a pattern of constitutional violations because of a training deficiency. In response to the Supreme Court's concern regarding causation in the municipal liability context, Plaintiff argues that the line of causation between inadequate municipal training and a poorly trained employee's predictable constitutional violations will always be more direct than the line of

causation between inadequate municipal hiring decisions and the poorly hired employee's subsequent constitutional torts. Plaintiff contends that the jury instructions were sufficient to support municipal liability under *City of Canton* and that the evidence produced at trial was legally sufficient to establish Bryan County's liability on a theory of inadequate training.

Defendant, on the other hand, contends that Plaintiff's Section 1983 claim fails because there is no evidence of a pattern of widespread misconduct, rather, the only evidence Plaintiff has offered consists of an isolated incident involving one individual. Further, Defendant argues that it complied with the Oklahoma training requirements for a reserve deputy with respect to Burns. Specifically, Defendant claims that Burns began formal training at the Council on Law Enforcement Education and Training (CLEET) program on May 6, 1991, a date which was six days prior to the incident involving Plaintiff. As part of the CLEET training, Defendant contends that Burns learned the "arm bar" technique, the method Burns used to pull Plaintiff from the vehicle during the incident at issue in this case. Defendant urges the Court to follow the Fifth Circuit's holding in *Snyder v. Trepagnier*, No. 96-30935, 1998 WL 268280 (May 27, 5th Cir. 1998). In *Snyder*, the plaintiff alleged that a police department was liable for failing to train officers in stress management; however, the Fifth Circuit rejected this allegation because it found no evidence of a pattern of constitutional violations and it found that the totality of the evidence failed to meet the *City of Canton* standard: that the inadequacy be "so obvious" and "so likely to result in the violation of constitutional rights." *Id.* at *5 (citing *City of Canton*, 109 S. Ct. at 1205).

Appendix B

The Court is of the opinion that *City of Canton* governs Section 1983 claims of municipal liability based on inadequate municipal training. Contrary to Defendant's argument that municipal liability under Section 1983 requires widespread conduct, *City of Canton* provides that in limited circumstances, municipal liability may result from a single violation of constitutional rights, where the municipality's failure to train reflects deliberate indifference to an individual's constitutional rights. Also, unlike the evidence in *Snyder*, the evidence in this case abundantly satisfies the *City of Canton* standard that the inadequacy be "so likely to result in the violation of constitutional rights." 109 S. Ct. at 1205. After reviewing the record in this case, the Court finds that Sheriff Moore's failure to train Burns in the use of force when making arrests and in how to conduct roadblocks for driver's license checks constitutes deliberate indifference on the part of Defendant, and was the moving force behind Burns' violation of Plaintiff's constitutional rights. Now, the Court will review the jury instructions, jury verdict, evidence submitted in this case that supports the jury's verdict, and the damages awarded for the deprivation of constitutional rights.

I. The Jury Instructions

On Plaintiff's Section 1983 claim, the Court gave the following instructions:

> A county is liable for the deprivation of a constitutional right if the deprivation was pursuant to governmental custom, policy, ordinance, regulation or decision. Sheriff B.J. Moore is an

official whose acts constitute final official policy of Bryan County, Oklahoma. Therefore, if you find that the Plaintiff was injured as the proximate or legal result of Bryan County's policy, custom, ordinance, regulation or as a result of a decision by Sheriff B.J. Moore, then Bryan county is liable. In order to prove that a county . . . training policy violated the Plaintiff's rights under Section 1983, the Plaintiff must prove by a preponderance of the evidence that: One, the training . . . policies of the county's policymaker, B.J. Moore, were inadequate. Two, the County policymaker, B.J. Moore, was deliberately indifferent in adopting the . . . training policy. And three, the inadequate . . . training policy directly caused the Plaintiff's injury.

. . . .

Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional training policy if in light of the duties assigned to Deputy Sheriff Stacy Burns the need for more or different training was so obvious and the inadequacy so likely to result in violations of constitutional rights, that the Sheriff B.J. Moore can be reasonabl[y] said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

R. Vol. 10 at 799-801.

Appendix B

These instructions were proper and sufficient to support municipal liability under *City of Canton*. They were not objected to in the previous appeal. The instructions specifically required Plaintiff to prove by a preponderance of the evidence, deliberate indifference by Sheriff Moore and actual causation. Moreover, the instructions were based on the following *City of Canton* proposition:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. 109 S. Ct. at 1205.

II. Jury Verdict

In its verdict, the jury found that Burns had arrested Plaintiff without probable cause, had used excessive force, and that Bryan County was liable for Plaintiff's damages under Section 1983 for the inadequate training of Burns. The jury found that the training policy of Bryan County in the case of Burns, as instituted by its policymaker Sheriff Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of Plaintiff and that Burns' use of excessive force upon Plaintiff on May 12, 1991, caused Plaintiff's injuries.

Appendix B

III. Evidence Supporting Jury Verdict

The Court must afford great deference to jury findings. *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165, 1168 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1523 (1983). The "sufficiency of the evidence" standard applies to the review of a jury's verdict. The standard is as follows:

> The verdict must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. If there is evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the jury function may not be invaded.

Western Co. of North Am. v. United States, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 104 S. Ct. 237 (1983).

The Court finds that the evidence produced at trial sufficiently supports the jury's conclusion that Bryan County is liable under Section 1983, through Sheriff Moore's deliberate indifference to the training needs of Burns. The evidence is sufficient to support jury findings that Burns with no prior law enforcement experience or education and no training or instruction was assigned duties by Bryan County's policymaker that authorized him to make arrests and to use such force that could cause severe injury to the person being arrested.

Appendix B

A. Evidence of Deliberate Indifference

In 1991, B.J. Moore was the Sheriff of Bryan County, Oklahoma and the county's official policymaker with respect to the Sheriff's office. He appointed Burns, the twenty-one-year-old son of his nephew, as a reserve deputy sheriff for Bryan County. Burns had never worked in law enforcement and had never taken any courses in school in the field of criminal justice or in law enforcement. *R. Vol. 9* at 607. At the time he appointed Burns, Sheriff Moore was aware that Burns had violated the law and had been charged with such violation. *R. Vol. 9* at 647-48.

As a reserve deputy, Burns had extensive authority to perform all acts of a police officer except carry a gun or drive a patrol car. Despite this extensive authority, the evidence indicated that Burns, without any experience as a patrol officer, *R. Vol. 9* at 602, was placed in the field by Sheriff Moore immediately after his appointment and without any training, formal or informal, from the Bryan County Sheriff's Department. *R. Vol. 9* at 600-01. This lack of training included no training on how or when to use force when making an arrest. Also, although Defendants' evidence claimed that Burns enrolled in the CLEET training program on May 6, 1991, a mere six days before his arrest of Plaintiff and use of excessive force against her, the jury could have found from the evidence that Burns had not attended any CLEET classes prior to the incident in question and had not received any training in the "arm bar" technique, which Burns claimed to have learned at CLEET. Burns suffered a memory loss at trial regarding the number of CLEET classes he had attended and the jury was familiar with Burns' record, which

revealed a disregard for the law and for truthfulness. *R. Vol. 9* at 600; *R. Vol. 9* at 576-77. Additionally, the employment exhibits submitted by Plaintiff that were admitted into evidence suggested that Burns had no training from CLEET. First, the Employment Status Report ("ESR"), which provided the function of informing CLEET that the individual stated in the report was hired as a peace officer, was required to be submitted within ten days from the hire date. *R. Vol. 8* at 400-01. The ESR was signed and dated June 12, 1991, by both Burns and Sheriff Moore. *Pl.'s Ex.* 34. This date was thirty days after May 12, 1991, the date of the incident in question. Also, the CLEET application, which had to be completed and submitted before an individual would be accepted into the CLEET program, was signed and dated May 30, 1991, eighteen days after the incident in question. *Pl.'s Ex.* 33.

Due to Sheriff Moore's familial relationship to Burns, the fact that Sheriff Moore was aware that Burns had been charged and convicted of violating the law at the time he was assigned to the roadblock, and the fact that on May 8, 1991, he obtained Burns' criminal record, *R. Vol. 9* at 535, the jury could have inferred that Sheriff Moore was aware of Burns' past criminal record, which included a conviction for assault and battery and other misdemeanor offenses. From this, the jury could have found that Sheriff Moore was aware of, but closed his eyes to, the obvious need to train Burns in the area of use of force before placing him in the field with authorization to make forcible arrests. Also, Sheriff Moore's indifference to the training and instruction of Burns was evident from the conflicting testimony of Sheriff Moore and Officer Morrison, the officer Burns allegedly assisted during

the incident in question and according to Sheriff Moore, Burns' supervising deputy. Sheriff Moore did not find it important to inform Burns that whatever deputy he rode with was his supervising deputy. Instead, Sheriff Moore believed this fundamental instruction was best left to the common knowledge of Burns. *R. Vol. 9* at 676-77. However, Officer Morrison testified that even though Burns rode with him to pursue plaintiff, he was not in charge of Burns during the incident in question, *R. Vol. 8* at 466, and that he had absolutely no instruction on how to work with a reserve deputy officer. *R. Vol. 8* at 487.

Burns' lack of training was also reflected in the absence of any specific training regarding situations likely to arise while stopping cars to check driver's licenses and for people driving under the influence of alcohol, Burns' duty during the incident in question. Specifically, Burns received no training on how to conduct a roadblock, *R. Vol. 9* at 602, how to pursue across state lines if necessary, *R. Vol. 9* at 602, or how to arrest in Texas. *R. Vol. 9* at 603. Despite Burns' lack of training and experience, Burns received no supervision during the incident involving Plaintiff, *R. Vol. 9* at 603, and no instructions during the pursuit. *R. Vol. 9* at 609.

The Court finds that there is ample evidence that in light of the duties assigned to Burns in connection with the recurring situations involved in the execution of a "state line" roadblock in a high crime area and the complete lack of training Burns in techniques that were necessary to carry out his duties, the need for training was so obvious and the inadequacy so likely to result in the violation of constitutional

rights, that Sheriff Moore acted with deliberate indifference when he failed to train Burns. Although Burns' lack of training may not have violated Oklahoma's minimum training requirements for a reserve deputy, this lack of training for the duties assigned to Burns did violate federal constitutional law.

B. Causation due to Training Deficiency

The jury found that Burns employed excessive force upon Plaintiff while arresting her. Additionally, the jury found that Plaintiff sustained physical injury and damages from Burns' use of excessive force. The Court finds a direct line of causation between Burns' lack of training in how and when to use force during an arrest and the injuries suffered by Plaintiff.

IV. Damages for Deprivation of Constitutional Right not to be Subjected to Excessive Force and for Loss of Liberty

The Court is convinced that it would be error to award the damages found by the jury in the amount of $50,000 for the deprivation of constitutional right not to be subjected to excessive force and the amount of $50,000 for the deprivation of constitutional right for loss of liberty. *See Hay v. City of Irving, Tex.*, 893 F.2d 796, 800 (5th Cir. 1990) . However, the Court is of the opinion that Plaintiff is the prevailing party on her claim of arrest without probable cause and she should be awarded nominal damages in the amount of $1 for the deprivation of that constitutional right.

Appendix B

Conclusion

The Court is of the opinion that Plaintiff's Motion for Entry of Judgment should be granted on Plaintiff's Section 1983 inadequate training claim.

IT IS SO ORDERED.

Signed this 22nd day of June, 1998.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:91CV229

JILL BROWN,

Plaintiff,

v.

STACY BURNS and THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Defendants.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, the undersigned presiding, and the issues having been duly tried and the jury having duly rendered its verdict and for the reasons set forth in the Court's Memorandum Opinion and Order of even date herewith, it is hereby ORDERED and ADJUDGED

That the Plaintiff, Jill Brown, recover of Defendant The Board of the County Commissioners of Bryan County, Oklahoma, and Defendant Stacy Burns, jointly and severally, the sum of Six Hundred Eleven Thousand Three Hundred Two and No/100 Dollars ($611,302.00) as actual damages, the sum of One and No/100 Dollar ($1.00) as nominal

damages, and the sum of Seventy-Seven Thousand Five Hundred and No/100 Dollars ($77,500.00) as attorneys' fees, and from Defendant Stacy Burns the sum of Twenty Thousand and No/100 Dollars ($20,000.00) as punitive damages, with prejudgment interest thereon at the rate of 3.43 percent per annum from September 20, 1993, to the date of this judgment and post-judgment interest at the rate of 5.41 percent per annum from the date of judgment until paid, together with all costs incurred by Plaintiff herein, and that Plaintiff have execution therefor.

IT IS SO ORDERED.

Signed this 22nd day of June, 1998.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 2, 1995

United States Court of Appeals,
Fifth Circuit.

JILL BROWN,

Plaintiff-Appellee,
Cross-Appellant,

v.

BRYAN COUNTY, OK, et al.,

Defendants,

BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA, et al.,

Defendants-Appellants,
Cross-Appellees.

No. 93-5376.

June 2, 1995.

* * *

Appeal from the United States District Court
for the Eastern District of Texas.

Appendix C

Before REYNALDO G. GARZA, WIENER, EMILIO M. GARZA, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

A claim for damages was brought against Reserve Deputy Stacy Burns (Burns) and Bryan County, Oklahoma (Bryan County),[1] by Jill Brown (Mrs. Brown) pursuant to 42 U.S.C. § 1983 and Oklahoma law. The case proceeded to trial, in which the jury found in favor of the Plaintiff on every interrogatory submitted. The district court entered a judgment in accordance with the jury's verdict with one exception: Mrs. Brown was not allowed to recover for loss of past income or future earning capacity. Burns and Bryan County (collectively the "Appellants") appeal the judgment against them while Mrs. Brown appeals the portion of the judgment that denied her recovery for lost past income and future earning capacity. For the reasons stated below we affirm the district court's judgment.

BACKGROUND

In the early hours of May 12, 1991, Todd Brown (Mr. Brown) and Mrs. Brown were traveling from Grayson County, Texas, to their home in Bryan County, Oklahoma. After crossing into Oklahoma, Mr. Brown, who was driving, noticed a police checkpoint. He decided to avoid the checkpoint and headed back to Texas, allegedly to spend

1. This suit was originally brought against several parties, but the district court dismissed the claims concerning the other Defendants, leaving Bryan County and Stacy Burns as the only Defendants.

the night at his mother's house. Although the parties offer conflicting stories leading to the pursuit, Deputy Sheriff Robert Morrison (Deputy Morrison) and Burns stated that they "chased" the Browns' vehicle at a high rate of speed before successfully pulling it over. Mr. Brown testified that he was oblivious to the deputies' attempts to overtake him until both vehicles had traveled approximately three miles.[2] By the time the two vehicles eventually stopped, the parties had crossed into Grayson County, Texas, four miles from the Oklahoma checkpoint.

Immediately after exiting the squad car, Deputy Morrison unholstered his weapon, pointed it toward the Browns' vehicle, and ordered the occupants to raise their hands. Burns, who was unarmed,[3] rounded the corner of the truck to the passenger's side. After twice ordering Mrs. Brown from the vehicle, Burns pulled her from the seat of the cab and threw her to the ground. Burns employed an "arm bar" technique whereby he grabbed Mrs. Brown's arm at the wrist and elbow, extracted her from the vehicle and spun her to the ground. Mrs. Brown's impact with the ground caused severe injury to her knees, requiring corrective surgery.[4] While Mrs. Brown was pinned to the ground, Burns

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2. Apparently, the road traveled on was winding, thereby, diminishing the visibility of other vehicles approaching from behind.

3. Although Burns was working for the Sheriff's Department, he was not authorized to carry a firearm or drive a squad car.

4. Mrs. Brown received a total of four operations on her knees. Moreover, medical testimony was elicited at trial which showed that Mrs. Brown would ultimately require total knee replacements.

handcuffed her and left to assist Deputy Morrison in subduing her husband. Mrs. Brown remained handcuffed anywhere from a minimum of thirty minutes to just over an hour.

According to Mrs. Brown's version of the facts, which will be reviewed in greater detail below, the deputies' pursuit and the force consequently applied against her were unprovoked. Furthermore, she claims that her detention constituted false imprisonment and false arrest. Due to the injuries resulting from that encounter, Mrs. Brown seeks compensation from Burns and Bryan County. Mrs. Brown premised the county's liability on two related but distinct policy theories: the hiring of Burns by Sheriff B.J. Moore (Sheriff Moore), the final policymaker for the Sheriff's Department, without adequate screening and Burns' inadequate training.

DISCUSSION

The Appellants have presented this Court with a host of issues to support their position that the lower court erred. For efficiency's sake, we will address only those points that we believe merit review. We first address the claims against Burns for the constitutional injuries that Brown suffered.

I.

In their first argument, Burns and Bryan County allege that the force applied against Mrs. Brown was proper. Appellants claim that the evidence "undisputedly" established that Burns' actions on the morning of May 12,

1991, were objectively reasonable. Therefore, the jury's findings should be reversed.

All claims that a law enforcement officer has used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other "seizure" of a free citizen, are analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). The test of reasonableness under the Fourth Amendment requires

> careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. at 396, 109 S.Ct. at 1872. The "reasonableness" of the particular force used must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. Id. In cases implicating excessive force, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. Id. (citation omitted). Thus, the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. Id. at 397, 109 S.Ct. at 1872.

Determining whether Burns' actions were reasonable depends on whose story the trier of fact accepts as true.

Appendix C

According to the testimony of Burns and Deputy Morrison, they were involved in a "high-speed" pursuit[5] after the Browns abruptly turned their truck and sped from the checkpoint. After a four mile "chase" both vehicles came to a full stop. The deputies exited their vehicle and made several commands for the occupants to raise their hands before those commands were obeyed. After rounding the truck, Burns twice ordered Mrs. Brown to exit the vehicle, but she did not comply. He then perceived that she was "lean[ing] forward" in the cab of the truck as if she were "grabbing a gun."[6] He was "scared to death," so he extracted her from the vehicle. He spun her around, dropped her to the ground via the arm bar maneuver, and handcuffed her. That was the lowest amount of force he deemed necessary to extract her and ensure he and his partner's safety.

Certainly, Appellants' version of the facts supports a claim that Burns acted reasonably and with an appropriate amount of force. The Browns, however, paint a strikingly different picture. They testified that they were oblivious to the attempts made by the deputies to catch up to them (the Browns) after avoiding the Oklahoma checkpoint.[7] Mr.

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5. The deputies testified that they were pursuing the Browns at speeds in excess of 100 miles per hour.

6. The fact that two firearms were found in the truck after the arrest does not make Burns actions any more or less reasonable, unless his actions had resulted from the observation of those guns prior to the arrest. That was not the case, however.

7. Mr. Brown testified that initially, he did not hear any police sirens, or observe a squad car following them. Finally, after driving

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Brown avoided that stop because he feared the possibility of being harassed or unnecessarily detained by the deputies.[8] He further testified that he did not believe that he turned the truck around either in a reckless fashion nor with wheels squealing or throwing gravel, and that he drove away at a normal rate of speed. Finally realizing that they were being pursued, Mr. Brown pulled over only to find a gun pointed at him. They were ordered to put their hands up and they did so.

Mrs. Brown then testified that Burns ran to her side of the vehicle and ordered her to get out. She was paralyzed with fear and heard Burns repeat the command. According to her testimony, however, she was not slow in responding to Burns' orders and she did not make any sudden moves while exiting the vehicle. Her only forward movement was to exit the truck and, contrary to Burns' testimony, she did not reach for anything. Then, while she was exiting the truck, Burns suddenly grabbed her arm, yanked her out, spun her around and threw her to the pavement. She could not break her fall because one arm was raised and Burns firmly gripped the other.

In addition to this conflicting testimony, both sides elicited expert testimony concerning the reasonableness of

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for several minutes at speeds of 40 to 55 miles per hour, he glimpsed the blue lights from the deputies' vehicle and determined that he was being pursued. He stopped the truck at the first available opportunity.

8. Mr. Brown alleged that he had been unnecessarily detained at that checkpoint on several occasions.

Burns' actions. Mrs. Brown's expert, for example, concluded that the force applied by Burns in this situation was unjustified and excessive.[9] The jury weighed all the evidence, evaluated the conflicting testimony and rendered a verdict in Mrs. Brown's favor. Under our standard of review,[10] when the evidence supports the verdict, this Court will not impose its own opinion in contravention to the jury's. Therefore, we will not interfere with the fact finder's conclusion that

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9. The expert did acknowledge that the force used was the lowest force that could have been applied in extracting and subduing an arrestee without endangering either party. However, he did not feel that the situation required this type of force.

10. The standard for appellate review of a jury's verdict is exacting. Granberry v. O'Barr, 866 F.2d 112, 113 (5th Cir.1988). It is the same standard as applied in awarding a directed verdict or a judgment notwithstanding the verdict and is referred to as the "sufficiency of the evidence" standard. Id. The standard is as follows:

> "The verdict must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. If there is evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the jury function may not be invaded." Id. (quoting Western Co. of North Am. v. United States, 699 F.2d 264, 276 (5th Cir.), cert. denied, 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983)). Stated another way, the Court should consider all of the evidence, not just that evidence which supports the nonmovant's case, in the light and with all reasonable inferences most favorable to the nonmovant. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir.1969) (en banc).

Burns' actions were unreasonable and that the force he used was excessive.

II.

Notwithstanding the jury's findings, Appellants also assert that there was probable cause to arrest Mrs. Brown. They argue that the facts justified Burn's actions, thereby precluding Mrs. Brown's § 1983 claim for false arrest.

There is no cause of action for false arrest under § 1983 unless the arresting officer lacked probable cause. Fields v. City of South Houston, Tex., 922 F.2d 1183, 1189 (5th Cir.1991). To determine the presence or absence of probable cause, one must consider the totality of the circumstances surrounding the arrest. United States v. Maslanka, 501 F.2d 208, 212 (5th Cir.1974),[11] cert. denied, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975). Whether officers have probable cause depends on whether, at the time of the arrest, the " 'facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the arrested] had committed or was committing an offense.' " Id. (quoting Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964)). Furthermore, although flight alone will not provide probable cause that a crime is being

11. In Maslanka, a police officer observed a car coming down a road and, upon seeing his unmarked car, it turned around and sped away in flight. This Court found that this observation provided sufficient facts for an officer to investigate. Maslanka, 501 F.2d at 213. Upon stopping the car, the officer smelled marihuana smoke, creating the probable cause necessary to arrest the passengers. Id.

committed, in appropriate circumstances it may supply the " 'key ingredient justifying the decision of a law enforcement officer to take action.' " United States v. Bowles, 625 F.2d 526, 535 (5th Cir.1980) (quoting United States v. Vasquez, 534 F.2d 1142, 1145 (5th Cir.), cert. denied, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587 (1976)).

To reiterate, whether Burns had probable cause to arrest Mrs. Brown depends in large part on whether the facts, as Burns knew them, were sufficient to warrant a prudent man's belief that Mrs. Brown committed or was in the process of committing a crime. The facts material to that determination were hotly contested, especially the contradictory testimony relating to the pursuit and Mrs. Brown's movements while exiting the vehicle. Thus, it was for the fact finder to determine whether Burns had probable cause to arrest Mrs. Brown. Harper v. Harris County, Tex., 21 F.3d 597, 602 (5th Cir.1994). Assuming arguendo that the deputies had a reasonable suspicion to perform an investigatory stop, we nevertheless find the evidence sufficient to support the jury's finding that Burns did not have probable cause to arrest Mrs. Brown, and that his doing so violated her constitutional right to be free from false arrest.

As the jury found that Burns did not have probable cause to detain or arrest Mrs. Brown, it could also find from the evidence that she was falsely imprisoned. To set out a claim for false imprisonment the plaintiff must prove (1) an intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm. Harper v. Merckle, 638 F.2d 848, 860 (5th Cir. Unit B Mar.), cert. denied, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d

85 (1981). Under § 1983, the plaintiff must also prove the deprivation of a constitutional right, i.e., an illegality under color of state law. Id. The evidence establishes that Mrs. Brown believed herself to be under arrest: even though she had committed no crime, she remained handcuffed for approximately an hour before being released, during which time she was never informed of the nature of the charges for which she was being detained, and subsequently no charges were ever brought. In light of such evidence, a finding of false imprisonment is proper.[12]

III.

Appellants also contest the jury's finding that Burns was not entitled to qualified immunity. A proper analysis of a qualified immunity defense requires us to conduct a two (sometimes three) prong inquiry. See Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). First, we determine "whether the plaintiff has asserted a violation of a constitutional right at all." Siegert, 500 U.S. at 232, 111 S.Ct. at 1793. Second, we ascertain whether the law was clearly established at the time of the official's action. Siegert, 500 U.S. at 233-34, 111 S.Ct. at 1794; Harlow, 457 U.S. at 815-19, 102 S.Ct. at 2737-38. Third, we evaluate the "objective reasonableness of [the] official's conduct as measured by reference to clearly established law." Harlow, 457 U.S. at 818, 102 S.Ct. at 2739. It is clear that by 1991, use of excessive force, false arrest and false imprisonment

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12. As this Court finds that liability was proper for the claims of excessive force, false arrest and false imprisonment, it need not address the state law issues involved herein.

had been held to violate citizens' constitutional rights, thus the qualified immunity defense fails if Burns did not act with probable cause. As the trier of fact determined that Burns did not have probable cause to arrest Mrs. Burns, he is not entitled to qualified immunity.[13]

IV.

Burns asserts that the evidence is insufficient to support the jury's award of punitive damages. He argues that application of the arm bar technique did not rise to a level of "flagrant" conduct and further, that it did not evidence malice or give rise to an inference of evil intent.[14] Nevertheless, the Supreme Court has ruled that punitive damages are recoverable in a § 1983 action. Smith v. Wade, 461 U.S. 30, 35, 103 S.Ct. 1625, 1629, 75 L.Ed.2d 632 (1983). One of the primary reasons for § 1983 actions and punitive damages is to deter future egregious conduct. Id. at 49, 103 S.Ct. at 1636. A jury may assess punitive damages in an action under § 1983 if the defendant's conduct is shown to be motivated by evil motive or intent, or involved reckless or callous indifference to the federally protected rights of others. Id. at 56, 103 S.Ct. at 1640. The question is whether the acts of Burns, which caused the deprivation of Mrs. Brown's constitutional rights, rose to a level warranting the imposition

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13. "While it is correct that the reasonableness of the arresting officer's conduct under the circumstances is a question of law for the court to decide, such is not the case where there exist material factual disputes. . . ." Harper v. Harris County, Tex., 21 F.3d 597, 602 (5th Cir.1994) (discussing officer's qualified immunity).

14. Mrs. Brown did not respond to this argument in her briefs.

of punitive damages. In light of the evidence before it, we believe that the jury could properly infer that Burns' acts were unjustified and that he acted with callous or reckless indifference to Mrs. Brown's constitutional rights. Therefore, punitive damages were justified.

V.

On cross-appeal, Mrs. Brown argues that it was error for the district court to grant Appellants' Motion for Judgment Notwithstanding the Jury Verdict (JNOV) as it relates to her claims for loss of past income and future earning capacity.[15] Mrs. Brown asserts that neither Bryan County nor Burns specifically raised an issue concerning the sufficiency of the evidence supporting that portion of the judgment, thus the district court's action was unjustified and the award must be reinstated. She insists that there is absolutely no legal predicate on which the district court could base its actions. Therefore, as evidence was offered to support this award, Mrs. Brown argues that the original jury award should be reinstated.

This Court has determined that it "would be a constitutionally impermissible re-examination of the jury's

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15. In the order, the district court stated "[t]he jury awarded plaintiff substantial damages in this case, including $36,000 for loss of income in the past and $180,000 for loss of earning capacity in the future. After a review of the evidence in this case, the Court is convinced that there is no legally sufficient evidentiary basis for the award of these damages. Therefore, judgment should be granted for the defendants on plaintiff's claims for loss of income in the past and loss of earning capacity in the future."

verdict for the district court [or this Court] to enter judgment n.o.v. on a ground not raised in the motion for directed verdict." McCann v. Texas City Refining, Inc., 984 F.2d 667, 672 (5th Cir.1993). It is undisputed that the Appellants did not address the sufficiency of the evidence supporting the jury's award for loss of past income and future earning capacity in their motions for either directed verdict or JNOV. Thus, the lower court should not have decided whether sufficient evidence exists to support this award. However, as the Appellants point out, Mrs. Brown failed to object to this error at trial, and it is the "unwavering rule in this Circuit that issues raised for the first time on appeal are reviewed only for plain error." Id. In other words, this Court will reverse only if the error complained of results in a "manifest miscarriage of justice." Id. Furthermore, contrary to Mrs. Brown's contention, the issue is not whether any evidence exists to support the jury verdict. Instead, the issue is whether the district court's action constituted plain error.

Upon reviewing the record, we do not believe that the lower court's error resulted in a manifest miscarriage of justice. The only evidence offered in support of the award comprised of Mrs. Brown's testimony, which reflected that she had accepted an offer to commence work a few days after the day of the incident. Her compensation would have been measured on a commission basis, which she believed would have paid between $1,500 to $1,800 a month. The district court's ruling that this evidence was lacking does not arise to plain error. Mrs. Brown's failure to object at the appropriate time denied the district court the opportunity to rectify any errors. Therefore, the court's ruling will stand.

Appendix C

VI.

Having found that Burns violated Mrs. Brown's constitutional rights, the next inquiry concerns the possible liability of Bryan County. It is well established that in a § 1983 action, liability may not be imposed on a government entity on a theory of respondeat superior for the actions of nonpolicymaking government employees. Monell v. Dep't of Social Servs. of New York, 436 U.S. 658, 690-94, 98 S.Ct. 2018, 2035-37, 56 L.Ed.2d 611 (1978). In certain instances, however, a municipality may incur § 1983 liability for its employees' actions when an official policy or custom of hiring or training causes those actions. Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir.), cert. denied, 506 U.S. 824, 113 S.Ct. 79, 121 L.Ed.2d 43 (1992). To prove that a municipal hiring or training policy violated an individual's rights, the plaintiff must show that (1) the hiring or training procedures of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent to the constitutional rights of the citizens in adopting the hiring or training policy; and (3) the inadequate hiring or training policy directly caused the plaintiff's injury. Id. (citing City of Canton v. Harris, 489 U.S. 378, 390-92, 109 S.Ct. 1197, 1205-06, 103 L.Ed.2d 412 (1989)).

Liability will accrue for the acts of a municipal official when the official possesses "final policymaking authority" to establish municipal policy with respect to the conduct that resulted in a violation of constitutional rights. Pembaur v. City of Cincinnati, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986) (plurality opinion). Municipal liability

is limited to "acts that are, properly speaking, acts 'of the municipality' — that is, acts which the municipality has officially sanctioned or ordered." Id. at 480, 106 S.Ct. at 1298. The mere exercise of discretion by a county official will not be sufficient, by itself, to generate municipal liability:

> The fact that a particular official — even a policymaking official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Id. at 481-83, 106 S.Ct. at 1299-1300.

Bryan County has all but conceded that Sheriff Moore alone set all policies involving the conduct and operation of his office.[16] In fact, Appellants even stipulated that Sheriff Moore was the final policymaker for the Sheriff's Department. As such, it is patently clear that Sheriff Moore is an official "whose acts or edicts may fairly be said to represent official policy and whose decisions therefore may give rise to

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16. In the pre-trial order, Appellants' ask "[w]hether Defendant Board of County Commissioners is liable under 42 U.S.C. § 1983 when they did not participate in any policy decisions with regards to the conduct and operation of the office of Bryan County Sheriff?" Appellants also failed to object to the jury instructions which referred to Sheriff Moore as the final policymaker. See Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 754 (5th Cir.1993) (failure to lodge an objection to court's instructions regarding the final policymaker waived the issue).

municipal liability under § 1983." Id. at 480, 106 S.Ct. at 1299 (citing Monell, 436 U.S. at 694, 98 S.Ct. at 2037).

Mrs. Brown maintains that her injuries resulted from two "policies" chosen by Sheriff Moore in his official capacity as the final policymaker in the Sheriff's Department.[17] The first purported policy is Sheriff Moore's decision to hire Burns without conducting an adequate background investigation. The other policy is Sheriff Moore's decision to provide Burns with minimal training and preparation for his duties as a peace officer before permitting him to act in that capacity. Thus, Mrs. Brown argues that a municipality can be held liable under § 1983 based on a final policymaker's single decision regarding the hiring or training of one individual. Appellants, on the other hand, argue that § 1983 liability cannot attach on the basis of a policymaker's single, isolated decision to hire or train one individual.

An argument similar to the Appellants' was rejected by this Court in Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 754 (5th Cir.1993). In Gonzalez, the Ysleta Independent School District (YISD) was sued for a single decision to transfer a teacher accused of sexually harassing a student, rather than removing him from the classroom. YISD argued that this ad hoc, isolated decision, even when made by

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17. Mrs. Brown distinguishes her "policy" claims from "custom" claims and notes that she could not recover on the latter theory because her injuries were the result of either of two single decisions: Sheriff Moore's decision to hire Burns or his decision to train Burns inadequately. The injuries, therefore, were not caused by a widespread practice or procedure of inadequately hiring or training personnel.

policymakers, did not constitute the sort of "policy" upon which municipal liability could be predicated under Monell. This was especially true there, insisted YISD, as the decision was contrary to the district's own formal policy for handling such matters. This argument proved unpersuasive.

The term "policy" is distinguished from custom as follows: policy is defined as a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by a [municipality's officers]," while custom consists of "persistent and widespread . . . practices of . . . officials." Monell, 436 U.S. at 690-91, 98 S.Ct. at 2036 (emphasis added).[18] "Policy" often refers to formal rules and

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18. Accord Johnson v. Moore, 958 F.2d 92 (5th Cir.1992). In Moore, this Court defined policy and custom as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Id. at 94 (citing Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir.1984) (en banc) (emphasis added), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985)).

understandings, but its meaning is not exhausted by " 'fixed plans of actions to be followed under similar circumstances consistently and over time.' " Gonzalez, 996 F.2d at 754 (quoting Pembaur, 475 U.S. at 480-81, 106 S.Ct. at 1299). "To the contrary, it is well established that a municipality may be held liable for 'course[s] of action tailored to a specific situation and not intended to control decisions in later situations,' provided that the 'decision to adopt that particular course of action is properly made by that government's authorized decisionmakers.' " Id. (quoting Pembaur, 475 U.S. at 481, 106 S.Ct. at 1299) (emphasis added). Additionally, the existence of a well-established, officially adopted policy will not insulate the municipality from liability where a policymaker departs from these formal rules. See, e.g., St. Louis v. Praprotnik, 485 U.S. 112, 122-26, 108 S.Ct. 915, 923-25, 99 L.Ed.2d 107 (1988) (plurality opinion).

Based on the facts before it, the Gonzalez panel concluded that the final policymaker's single, conscious decision, i.e., the Board of Trustee's decision to transfer the teacher rather than remove him from the classroom, constituted a "policy" attributable to the school district. Gonzalez, 996 F.2d at 754. This conclusion was logical, as "[n]o one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body . . . because even a single decision by such a body unquestionably constitutes an act of official government policy." Pembaur, 475 U.S. at 480, 106 S.Ct. at 1298 (emphasis added).[19] To deny compensation

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19. In Pembaur, the Supreme Court held that a county prosecutor's single decision, ordering law officers to forcibly enter

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to the victim in such a case would be contrary to the fundamental purpose of § 1983. Id. at 481, 106 S.Ct. at 1299. So, it is clear that a single decision may create municipal liability if that decision were made by a final policymaker responsible for that activity.

Bryan County, however, further contends that a pattern of repeated injuries must develop before municipal liability can accrue against it. This Court is aware of the case law in this Circuit stating that "[i]solated violations are not the persistent, often repeated constant violations that constitute custom and policy" as required for § 1983 liability. See, e.g., Bennett v. City of Slidell, 728 F.2d 762, 768 n. 3 (5th Cir.1984), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir.), cert. denied, 506 U.S. 973, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992). Similarly, the first case in the lineage of Monell, City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), also indicated that a single incident of unconstitutional activity will not suffice to hold a municipality liable under Monell "unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." Id. at 823-24, 105

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a dentist's office, was actionable under § 1983. 475 U.S. at 480-81, 106 S.Ct. at 1298-99. However, the Court cautioned that liability would only attach where the course of action was deliberately chosen by a decisionmaker possessing final authority to establish municipal policy. Id. at 481, 106 S.Ct. at 1299. We note that Mr. Pembaur's § 1983 action was premised on a theory of municipal policy and not on a theory of municipal custom. Id. n. 10.

S.Ct. at 2436. Thus, once an unconstitutional policy is established, " 'it requires only one application . . . to satisfy fully Monell's requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy.' " Pembaur v. City of Cincinnati, 475 U.S. 469, 478 n. 6, 106 S.Ct. 1292, 1297 n. 6, 89 L.Ed.2d 452 (1986) (quoting Tuttle, 471 U.S. at 822, 105 S.Ct. at 2435).

But "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." Tuttle, 471 U.S. at 824, 105 S.Ct. at 2436 (citations omitted). Thus, the Supreme Court envisioned only two types of policies: constitutional and unconstitutional. Of course, the Court's logic is irrefutable, as a policy either is or is not constitutional. However, when determining whether or not more than one incident is needed to impose liability, we believe that the distinction between policies that are unconstitutional, that is, policies that require or compel violations, and otherwise constitutional policies, is "metaphysical."[20] In certain cases, the facts may undoubtedly fall somewhere in between.

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20. See Gonzalez, 996 F.2d at 754-55 (discussing "metaphysical" distinction (quoting Tuttle, 471 U.S. at 833 n. 8, 105 S.Ct. at 2441 n. 8 (Brennan, J., concurring in part))). It is only in the latter case, i.e., where a policy is otherwise constitutional, where more than one incident or violation must be shown to have occurred.

Appendix C

In Gonzalez we recognized that a single constitutional decision can constitute an unconstitutional policy if the causal link between the decision and the unconstitutional result is too compelling to ignore. As explained below, the hiring decision made by the final policymaker for the Sheriff's Department — not merely a non-policymaking county employee — created a high likelihood that a citizen's constitutional rights would be violated. Consequently, as we deem such decision to be unconstitutional, a single application of that invalid policy, i.e., the hiring of Burns, is sufficient to satisfy Monell.

Furthermore, we note that the primary reason for requiring a "pattern" of violations before imposing municipal liability is to alert the final policymakers of deficiencies in municipal programs or practices.[21] So, once the final policymakers are actually or constructively aware of any problem areas, they can take the necessary corrective measures. If they fail to take such measures, the government entity itself can be held liable, but only if the citizen can also prove that this failure was due to the deliberate indifference of the policymakers and that the policy itself caused the injuries.

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21. See Bennett v. City of Slidell, 728 F.2d 762, 768 (5th Cir.1984) ("Sufficient duration or frequency of abusive practices, or other evidence, must warrant a finding of knowledge on the part of the governing body that the objectionable conduct has become customary practice of city employees. Where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation."), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985) (emphasis added).

Appendix C

As the final policymaker for the Sheriff's Department, Sheriff Moore was conscious of his own policy decision and was thus aware or deliberately indifferent to its inadequacy. Thus, if Mrs. Brown proves the necessary "deliberate indifference" and "causation" elements, we need not wait for Sheriff Moore to hire several other unqualified applicants, and wait for other citizens' rights to be violated, before section 1983 liability can be imposed.

A.

Mrs. Brown argues that Burns' lengthy criminal history should have prevented Sheriff Moore from hiring him. Burns' history revealed a string of offenses that, she claims, demonstrates a disregard for the law and a propensity for violence. Moreover, she maintains that a thorough investigation of Burns' background would have revealed that his probation had been violated by his numerous offenses. Thus, she argues that Burns' screening and subsequent employment by Sheriff Moore were inadequate and subjected Bryan County to liability.

As explained above, in inadequate hiring cases the plaintiff must show that (1) the hiring procedures of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent in adopting the hiring policy; and (3) the inadequate hiring policy directly caused the plaintiff's injury. Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir.) (citing City of Canton v. Harris, 489 U.S. 378, 390-92, 109 S.Ct. 1197, 1205-06, 103 L.Ed.2d 412 (1989)), cert. denied, 506 U.S. 824, 113 S.Ct. 79, 121 L.Ed.2d 43 (1992). In analyzing the

first element, i.e., whether Sheriff Moore's decision to hire Burns was adequate, we turn to Stokes v. Bullins, 844 F.2d 269 (5th Cir.1988), for guidance.

The plaintiff in Stokes, who was shot by a police officer, sought to impose liability against the town that had hired the officer, on grounds that it had failed to establish adequate policies for hiring its police officers. To establish that the town's hiring "policy" was inadequate, the plaintiff relied on one allegedly inadequate hiring decision, i.e., the decision by the town to employ the officer who shot the plaintiff, even though the town's mayor and an alderman were aware that the officer had previously been arrested for several minor offenses in nearby towns. The known arrests were thoroughly investigated, but the town failed to conduct a National Crime Information Center (NCIC) computer search, which would have revealed a criminal history of approximately fifteen arrests, on charges ranging from simple assault to armed robbery. After reviewing these facts, the district court concluded that the failure to perform a NCIC check constituted gross negligence and conscious indifference to the public's welfare.

This Court disagreed with the lower court's ruling and refused to make performance of a NCIC check a constitutional requirement in assessing municipal liability. Id. at 275; see Benavides, 955 F.2d at 975. Nonetheless, the Court stated that,

> [we do not] imply that a municipality may close its eyes to the background of those seeking employment with it. If a § 1983 claim may arise

> from egregious hiring practices, however, we would analogize with [Languirand v. Hayden, 717 F.2d 220 (5th Cir.1983), cert. denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984)], and require a plaintiff to establish actual knowledge of the seriously deficient character of an applicant or (emphasis added) a persistent, widespread pattern of the hiring of policemen, for instance, with a background of unjustified violence.

Stokes, 844 F.2d at 275 n. 9.

This passage is crucial to our analysis because in it we recognize that a policymaker's wrongful hiring of one deficient individual can result in municipal liability. Moreover, it cautions that an applicant must not be hired blindly by a municipal entity.

In Benavides, this Court reviewed Stokes where, as mentioned above, the Court focused on the town's investigation of the applicant's prior employment history and his arrests for relatively trivial offenses before determining that the town was not deliberately indifferent in hiring the officer. Benavides, 955 F.2d at 975 (discussing Stokes — "The town's good faith hiring effort was adequately demonstrated by its review of the applicant's employment history and its review of those arrests that were brought to its attention."). Turning to the facts before it, the Benavides Court likewise concluded that the governmental entity was not liable for its hiring policy, as the policymaker authorized to make hiring decisions conducted a good faith investigation

into the applicant's background. Id. Therefore, as long as a municipality's hiring decision is based on a good faith investigation of the applicant's known arrest record and background, no further investigation is required to shield the municipality from § 1983 liability. In light of the teachings in Stokes and Benavides, we now turn to the facts before us.

Mrs. Brown does not premise her suit on a theory that Bryan County had a "widespread pattern" of hiring deficient policemen. Instead, she argues that Sheriff Moore's decision to hire a single, deficient applicant formed the basis for Bryan County's liability. In view of the authorities cited above, we believe that the decision to hire this single applicant gave rise to municipal liability. Liability will attach, however, only if the jury could infer from the evidence at trial that Sheriff Moore did not conduct a good faith screening and investigation of the applicant, thus leading to an inadequate hiring decision.[22]

During the application process Sheriff Moore ordered a printout of Burns' criminal record, which revealed the following citations and arrests: nine moving traffic violations, Actual Physical Control (APC) of a motor vehicle while intoxicated, driving with a suspended license, arrest

22. Of course, the appellee must also prove that the policy which produced or caused the unconstitutional violation resulted from the deliberate indifference of a final policymaker. Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 757-59 (5th Cir.1993). The court in Gonzalez ultimately determined that YISD was not liable to the plaintiff because the evidence did not show that the Board of Trustees acted with deliberate indifference. Id. at 762.

for assault and battery, conviction for possession of a false identification and an arrest for resisting lawful arrest. When Sheriff Moore was examined about Burns' "rap sheet" the following exchange took place:

> Q. Did you make an inquiry with the proper authorities in Oklahoma to get a copy of Mr. Burns' rap sheet?
>
> A. I run his driving record, yes.
>
> Q. All right. And you can get that rap sheet immediately, can't you?
>
> A. It don't take long.
>
> Q. All right. And did you not see on there where Mr. Burns had been arrested for assault and battery? Did you see that one on there?
>
> A. I never noticed it, no.
>
> Q. Did you notice on there he'd been arrested or charged with [Driving While License Suspended] on several occasions?
>
> * * *
>
> A. I'm sure I did.
>
> Q. All right. Did you notice on there that he'd been arrested and convicted for possession of false identification?

A. No, I never noticed that.

Q. Did you notice on there where he had been arrested for public drunk?

A. He had a long record.

Q. Did you notice on there where he had been arrested for resisting arrest?

A. No, I didn't.

Q. Did you make any inquiries after you got that information to determine exactly what the disposition of those charges were?

A. No, I didn't.

Q. Did you not make any attempt to find out the status of Mr. Burns' criminal record at that time?

A. As far as him having a criminal record, I don't believe he had a criminal record. It was just all driving and — most of it was, misdemeanors.

Q. Well, did you make any attempts to determine whether or not Mr. Burns was on probation at the time you placed him out there?

A. I didn't know he was on probation, no.

Q. Did you make any effort to find out?

A. I didn't have no idea he was on probation, no.

Q. Well, you saw on his rap sheet where he had been charged with [Driving Under the Influence], didn't you?

A. I had heard about that. I don't remember whether I had seen it on the rap sheet or not.

Q. So you'd heard about it?

* * *

A. I don't remember whether I seen it on the rap sheet or heard about it.

Besides this damaging testimony, Mrs. Brown's expert[23] testified regarding the importance of properly screening law enforcement applicants. The expert testified that a thorough investigation process is needed to weed out individuals who enter the police force for the wrong reasons, for example, because "they like to exert their power." In light of Burns' arrest record, the expert concluded that he showed a "blatant disregard for the law and problems that may show themselves in abusing the public or using excessive force," thereby rendering Burns unqualified for a position in law enforcement. The expert further testified that as a minimum, Sheriff Moore should have investigated the disposition of the charges

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23. The record shows that the expert, Dr. Otto Schweizer, had spent over twenty years in law enforcement, including, several years as a field training officer, a police chief and as a professor of criminal justice and police administration at the University of Central Oklahoma.

against Burns. Even Appellants' expert, Ken Barnes, agreed that Burns' criminal history should have caused some concern, meriting a further review of the applicant. More importantly, when Mr. Barnes was asked if he would have hired Burns, he replied that it was "doubtful."

From the foregoing evidence, the jury could have reasonably inferred that Sheriff Moore "closed his eyes" to Burns' background when hiring him. This inference is reinforced by Burns' familial relations within the Sheriff's Department: not only is Burns the son of Sheriff Moore's nephew, but Burns' grandfather had been involved with the department for more than sixteen years. Alternatively, the jury could have inferred that Sheriff Moore was indeed aware of Burns' past problems with the law and was therefore cognizant of his deficient character, but nevertheless opted to employ him because he was "family".[24] Again, the innuendos of nepotism only bolster the inference that Burns would have been hired regardless of his criminal history.

We believe that the evidence supports the jury's conclusion that Sheriff Moore did not conduct a good faith investigation of Burns. Although it is true that Sheriff Moore ran a NCIC check of Burns, this action was futile given that Burns' arrest history was all but ignored. Sheriff Moore

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24. In light of the string of arrests and convictions, a jury could properly conclude that Burns had a propensity for violence and a disregard for the law, thus, precluding his employment. We deem such a conclusion proper, even though Burns had no felonies on his record. Oklahoma law prevents a sheriff from hiring an individual convicted of a felony or a crime involving moral turpitude. Okla.Stat.Ann. tit. 70, § 3311(d)(2) (West 1994).

conceded that Burns' record was so long that he did not bother to examine it. And, except for this feeble attempt to screen him, no other effort was made to investigate Burns. A further examination would have revealed that Burns had repeatedly violated probation, and that a warrant was subsequently issued for his arrest. In light of this history, it should have been obvious to Sheriff Moore that a further investigation of Burns was necessary.

We also find the evidence sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to the public's welfare. See Stokes v. Bullins, 844 F.2d 269, 275 (5th Cir.1988); Wassum v. City of Bellaire, Texas, 861 F.2d 453, 456 (5th Cir.1988); Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir.), cert. denied, 506 U.S. 824, 113 S.Ct. 79, 121 L.Ed.2d 43 (1992). In light of the law enforcement duties assigned to deputies, the obvious need for a thorough and good faith investigation of Burns, and the equally obvious fact that inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights, Sheriff Moore can reasonably be said to have acted with deliberate indifference to the public's welfare when he hired Burns. See City of Canton v. Harris, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989).[25] The failure to conduct

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25. Further, the lower court's charge to the jury was proper: "Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff if the need for closer scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B.J. Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff."

a good faith investigation of the prospective employee amounted to Sheriff Moore deliberately closing his eyes to the Burns' background.[26] Such indifferent behavior cannot be tolerated when the prospective applicant will be employed in a position of trust and authority.

Additionally, the jury could find that hiring an unqualified applicant and authorizing him to make forcible arrests actually caused the injuries suffered by Mrs. Brown. That is, the policymaker's (Sheriff Moore's) single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains. Benavides, 955 F.2d at 972; Fraire v. City of Arlington, 957 F.2d 1268, 1277 (5th Cir.) (section 1983 liability attaches only "where the municipality itself causes the constitutional violation" at issue), cert. denied, 506 U.S. 973, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992). Therefore, the violation of Mrs. Brown's constitutional rights was affirmatively linked to Bryan County's decision to hire Burns for law enforcement activities. Stokes v. Bullins, 844 F.2d 269, 276 (5th Cir.1988).

B.

Mrs. Brown also contends that Bryan County is liable for inadequately training Burns. The Supreme Court

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26. It is certainly true that the Sheriff had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street, but the fact that he diverged from that practice as to this one individual does not save Bryan County from liability. See Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 754 (5th Cir.1993).

specifically addressed claims for inadequate training in City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In reference to these claims, the Court stated that "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." Id. at 389, 109 S.Ct. at 1205. It also added the following:

> That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. . . . Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct.

Id. at 390-91, 109 S.Ct. at 1206 (internal citations omitted). A review of the record reveals that Sheriff Moore had enrolled Burns in the state-mandated Council on Law Enforcement Education and Training (CLEET) program while he worked as a Reserve Deputy.[27] As there is no evidence that Sheriff Moore did anything less than that which is required by law, we do not find the training practices inadequate. See Benavides v. County of Wilson, 955 F.2d 968, 973 (5th Cir.), cert. denied, 506 U.S. 824, 113 S.Ct. 79,

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27. Oklahoma law allows a sheriff to employ reserve deputies during their completion of CLEET. See Okla.Stat.Ann. tit. 19, § 547(B) (West 1994).

121 L.Ed.2d 43 (1992). Although Mrs. Brown's expert urged that additional instructional programs were necessary to supplement the CLEET course and on- the-job training, there is no evidence suggesting that the training standard required by law was inadequate to enable the deputies to deal with "usual and recurring situations" typically faced by peace officers. See id. In addition, failure-to-train cases — unlike the negligent-hiring cases — specifically require more than a single instance of injury or an isolated case of one poorly trained employee before municipal liability can attach. See, e.g., Languirand v. Hayden, 717 F.2d 220 (5th Cir.1983) (holding that, in failure-to-train cases, the plaintiff must establish a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct or that serious incompetence or misbehavior was general or widespread throughout the police force); Fraire v. City of Arlington, 957 F.2d 1268, 1287 (5th Cir.) (holding that, in failure-to-train cases, " '[i]solated violations are not the persistent, often repeated constant violations that constitute custom and policy' "), cert. denied, 506 U.S. 973, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992); Rodriguez v. Avita, 871 F.2d 552 (5th Cir.1989) (discussing Languirand, supra, and concluding that municipal liability could not be derived from a single incident of improvident discharge of a firearm by an officer). As Mrs. Brown claims that only Burns was inadequately trained and cites neither to other similar incidents nor widespread misbehavior, her claim alleging inadequate training must fail.

Appendix C

CONCLUSION

After a thorough review of the record, this Court finds that the evidence supports the jury's verdict holding Burns and Bryan County liable for Mrs. Brown's § 1983 claim based on her false arrest, false imprisonment and the inadequate hiring of Burns. We also find that the district court did not plainly err in dismissing the jury's award for Mrs. Brown's loss of past income and future earning capacity. For these reasons, the jury's verdict stands and the district court's judgment is

AFFIRMED.

Appendix C

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

Although I concur in most of the opinion of the Court, I dissent from Part VI of the opinion and the judgment as to Bryan County. My disagreement is with the majority's treatment of the Monell[1] issue — "that a single incident of unconstitutional activity will not suffice to hold a municipality liable under Monell 'unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker[,]' " maj. op. at 1420 (emphasis added) — which is based on our prior opinion in Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 754 (5th Cir.1993).

Clearly, Sheriff Moore was a policymaker under Monell; clearly, he hired Reserve Deputy Stacy Burns; clearly, there is sufficient evidence to support a finding that Sheriff Moore was deliberately indifferent in failing to conduct an adequate background investigation.[2] However, one inadequate background investigation, even by a municipal policymaker,

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1. Monell v. Department of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

2. Under Stokes v. Bullins, 844 F.2d 269 (5th Cir.1988), "[w]e . . . require a plaintiff [in cases such as this] to establish actual knowledge of the seriously deficient character of an applicant or a persistent, widespread pattern of the hiring of policemen, for instance, with a background of unjustified violence." Id. at 275 n. 9. Although the majority does not state explicitly that the jury could have found that Sheriff Moore actually knew of Burns' criminal record, because the evidence supports such a finding, I do not disagree with the majority's conclusion that Sheriff Moore was deliberately indifferent.

is not the "unconstitutional municipal policy" of which Monell, Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), or City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), talks. This error, in my opinion, flows from blurring the distinction made clear in Tuttle — "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." Tuttle, 471 U.S. at 824, 105 S.Ct. at 2436 (citations omitted) (emphasis added).

I do not agree, therefore, with the majority or with Gonzalez "that the distinction between policies that are unconstitutional, that is, policies that require or compel violations, and otherwise constitutional policies, is 'metaphysical.' " Maj. op. at 1421. The majority incorrectly, in my opinion, follows our opinion in Gonzalez in "recogniz[ing] that a single constitutional decision can constitute an unconstitutional policy if the causal link between the decision and the unconstitutional result is too compelling to ignore," id., without reconciling the Supreme Court's instruction in Tuttle that a jury must have "considerably more proof than the single incident" before it can find causation.[3] There is a constitutional difference between a sheriff ordering his deputies to violate citizen's constitutional rights, see, e.g., Pembaur, 475 U.S. at 484-85, 106 S.Ct. at 1300-01 (imposing

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3. Indeed, because Gonzalez eventually was decided on the question of deliberate indifference, the causation question was never firmly resolved. See Gonzalez, 996 F.2d at 754 (stating only that the policy "may have produced or caused the constitutional violation").

liability for district attorney's direct order to police officers to violate Fourth Amendment), and one that hires a reserve deputy without conducting an adequate background investigation. See id. at 482 n. 11, 106 S.Ct. at 1299-1300 n. 11 (plurality opinion) (requiring plaintiff to "establish that the unconstitutional act was taken pursuant to a municipal policy rather than simply resulting from such a policy in a 'but for' sense"); see also, City of Canton v. Harris, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989) (requiring a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation"); Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir.) (requiring plaintiff to show that "the inadequate hiring . . . policy directly caused the plaintiff's injury"), cert. denied, 506 U.S. 824, 113 S.Ct. 79, 121 L.Ed.2d 43 (1992). In my view, Brown failed to establish the constitutional liability of the county.[4] Accordingly, I would affirm the district court in all aspects, except that I would reverse as to Bryan County.

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4. I emphasize that it is the County's constitutional liability and not Sheriff Moore's tort liability that I question. See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989) (explaining that Due Process Clause does not constitutionalize "every tort committed by a state actor"); Collins v. City of Harker Heights, 503 U.S. 115, 127-29, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992) ("[W]e have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." (citations omitted)); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 450 (5th Cir.) (en banc) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." (quoting Baker v. McCollan, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979))), cert. denied, __ U.S. __, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994).

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 14, 2000

United States Court of Appeals,
Fifth Circuit.

JESS BROWN,

Plaintiff-Appellee-
Cross-Appellant,

v.

BRYAN COUNTY, OK; et al.,

Defendants,

BRYAN COUNTY, OK,

Defendant-Appellant-
Cross-Appellee,

STACY BURNS,

Defendant-
Cross-Appellee.

No. 98-40877.

Dec. 14, 2000.

* * *

Appendix D

Appeals from the United States District Court for the Eastern District of Texas; Paul N. Brown, Judge.

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion July 18, 2000, 5th Cir., 2000, 219 F.3d 450)

Before REYNALDO G. GARZA, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R.APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

Appendix D

DeMOSS, Circuit Judge, dissenting:

I file this dissent to the Order entered herein denying the Petition for Rehearing En Banc for the following reasons:

1. While the Order denying relief is technically correct in stating that a majority of the judges who are in regular active service did not vote in favor of en banc reconsideration, I think the actual vote by this Court on that issue should be stated: seven judges voted for en banc reconsideration and seven judges voted against en banc reconsideration. This tie vote reflects the depth of disagreement as to whether the conclusions of law reached by the majority in the panel opinion in this case are correct. I state this as a matter for the public record in order to encourage Bryan County to apply for a writ of certiorari to the United States Supreme Court and to encourage the Supreme Court to grant certiorari in this case and clearly decide the issue which was not before it in the prior appeal of this case to the Supreme Court.

The second reason I file this dissent is to disclose that during the course of balloting on whether this Court would reconsider this case en banc, the votes at one point were eight to four in favor of en banc reconsideration with two judges not yet voting. Shortly thereafter, one of the judges who had not previously voted, voted for en banc reconsideration and one of the judges who had previously voted for en banc reconsideration switched his vote to against en banc reconsideration. Shortly thereafter, another judge who had previously voted for en banc reconsideration switched his vote to against en banc reconsideration and the

judge who had not previously voted at all, voted against en banc reconsideration. In my tenure on this Court, this is the first occasion in which vote switching at the very end of the balloting had such a dramatic effect. In my view, the manner in which this tie vote was achieved is a further indication of the inconclusiveness of this tie vote as an indicator of the correctness of the majority opinion.

APPENDIX E — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — JURY INSTRUCTIONS

[Commencing at page 799]

* * *

I will now instruct you on the law applicable to Plaintiff's claim against Bryan County under Title 42, United States Code, Section 1983. If you have determined that Defendant Stacy Burns either arrested Plaintiff without probable cause or employed excessive force in arresting the Plaintiff, you will then need to consider whether Bryan County, Oklahoma may be liable to the Plaintiff under Section 1983.

Plaintiff's Claim under Section 1983 against the County is for inadequate hiring and training of Stacy Burns.

A county is liable for the deprivation of a constitutional right if the deprivation was pursuant to [800] governmental custom, policy, ordinance, regulation or decision.

Sheriff B.J. Moore is an official whose acts constitute final official policy of Bryan County, Oklahoma. Therefore, if you find that the Plaintiff was injured as the proximate or legal result of Bryan County's policy, custom, ordinance, regulation or as a result of a decision by Sheriff B.J. Moore, then Bryan County is liable.

In order to prove that a county hiring or training policy violated the Plaintiff's rights under Section 1983, the Plaintiff must prove by a preponderance of the evidence that:

One, the training or hiring policies of the county's policymaker, B.J. Moore, were inadequate.

Two, the County policymaker, B.J. Moore, was deliberately indifferent in adopting the hiring or training policy.

And three, the inadequate hiring or training policy directly caused the Plaintiff's injury.

Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff if the need for closer scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B.J. [801] Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional training policy if in light of the duties assigned to Deputy Sheriff Stacy Burns the need for more or different training was so obvious and the inadequacy so likely to result in violations of constitutional rights, that the Sheriff B.J. Moore can be reasonable said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

I will now instruct you on the law applicable to Plaintiff's claim against Bryan County based on negligence. Plaintiff has also brought state law actions against Bryan County contending that Sheriff B.J. Moore was negligent in the hiring and training of Reserve Deputy Sheriff Stacy Burns.

Appendix E

In order to prove the essential elements of Plaintiff's claims, the Plaintiff must prove by a preponderance of the evidence each of the following:

One, that Sheriff B.J. Moore was negligent in the hiring and/or training of Stacy Burns.

Two, that Sheriff B.J. Moore's negligence was a proximate cause of some injury sustained by the Plaintiff.

Negligence means failure to use ordinary care; that

* * *

[810] * * *

THE COURT: Does the Plaintiff have any objections?

MR. WALKER: No objections, Your Honor.

THE COURT: The Defendant has some objections?

MR. JACK KENNEDY: Yes, Your Honor, we do.

THE COURT: I will first state before the Defendant begins for the record that all requested instructions by either party that were not substantially given in the Court's Charge are refused.

MR. JACK KENNEDY: We object to the Court's Charge for its failure to define what is meant by "custom" as required by *Minell* (spelled phonetically) and other cases.

Appendix E

The evidence showing there was no established policy, therefore, a custom had to be also defined to the jury.

[811] We secondly object to the Charge for the failure of the Court to grant the Bryan County a good-faith defense in view, especially in view but not limited to that the County in all respects complied with the applicable state law.

We object to the instructions contained on Page 17 and 18 of the Charge relating to the policy for the reason that the Court has gone, has allowed the particular wrong of hiring Stacy Burns as being the policy. In the instruction which the Court gave, the Court talks about a general policy but then all of a sudden it all relates to the individual actions of the sheriff with respect to the Stacy Burns.

All of the cases hold that the Plaintiff is required, and the Court is required to instruct that if there is a violation of policy, that policy has to be independent of the act as it is directed with respect to Stacy Burns.

The jury, in its issues Number 6 and 7, is allowed to consider by virtue of the instruction that all that the County had to do was improperly hire Stacy Burns or improperly train Stacy Burns, and that in and of itself is sufficient to establish a policy and/or custom. The law is quite clear, as a result of *Tuttle* and *Langerand* and *Kent vs. Harris* (spelled phonetically) that the specific deficiency of the policy must be established and the Charge, on Page 17 and 18, simply does not do that. The Charge talks about a governmental custom and policy and the general allegation at [812] the bottom of the page of the general rules relating to the custom

or policy, but then the jury — the Court said that if the, without identifying what they do wrong, if they improperly hired or trained Stacy Burns, then that is a constitutional violation. I think the Court's instruction is totally improper for those reasons.

We further object to the Court's Charge for failing to require that the alleged improper training and hiring was the — strike that.

We object to the instruction because it did not require the Plaintiff to prove the specific deficiency in the training and hiring that would lead to the misconduct upon which the suit is based. We think that the law requires that the Court instruct the jury of the requisite causal connection between the injuries and municipal policy by instructing the jury that they must show specific deficiencies in the training given police officers and not Stacy Burns individually, and that this deficiency led the misbehaving officer to engage in the alleged misconduct. And of course, the evidence does not have any showing that that occurred in this case.

Now, with respect to the excessive force, we ask the Court to instruct in accordance with the alternative charge contained in the pattern jury instructions with regard to excessive force, or at least if not the alternative, in [813] the original one because the uniqueness of this case would require that all of the matters involving good faith and qualified immunity appear in the Charge as provided as a result of *Johnson vs. Morell* (spelled phonetically) and other cases. And the Court has in its instructions taken away any reasonable and necessary good faith and that is the very issue

in this case and has not followed the dictates of that pattern jury instruction.

In this connection, Judge, we would ask the Court to instruct the jury that unless you find that Bryan County sent out its officers on missions inadequately trained or there was a custom of using inexperienced trained officers on such missions, you will find for the County and against the Plaintiff on the 1983 issues.

We ask the Court — the Court failed to instruct, we ask the Court to instruct the jury that under 1983, an action will not lie for an arrest in violation of a state law, and before a person can be liable under 1983 or a county can be liable, he must have violated the federal constitution governing arrest.

We would further ask the Court to instruct in some manner the Court deems proper that there is no constitutional prohibition against an arrest for investigation where probably cause exists. For there to be a probable cause to make an investigatory stop and an intrusion of the rights of [814] another, the officers must show a specific articulable fact in which taken together with rational inferences from those facts reasonably raise a suspicion warranting that intrusion. We think in this case, Your Honor, the actions require that some instruction be given to the jury as to the right of the officers under *Terry vs. Ohio and Others* (spelled phonetically) to make a pursuit to make an investigatory stop and to make an intrusion upon Jill Brown and Todd Brown during that investigatory stop. And a failure to do so I think is error.

We would object to the instruction regarding the negligence of the County and ask the Court to give

instructions similar to this; that a County is not liable under Section 1983 for the negligence or gross negligence of its officers, including the sheriff or including Stacy Burns, or including the sheriff in failing to train Stacy Burns in the absence of evidence or at least a pattern of similar incidents in which citizens were injured or endangered intentionally or negligently by police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the sheriff's force.

We ask the Court to instruct the jury that flight from a scene on a checkpoint or roadblock could suggest probable cause to pursue and make an investigatory stop.

We further ask the Court to instruct the jury that [815] the — any alleged unconstitutional acts of Stacy Burns had to be, in order for the County to be held liable, it had to be the product of official government policy or the lack thereof.

We ask the Court to, in compliance with 220S196, I believe, of the Oklahoma statutes, to instruct that under the law of the State of Oklahoma, you're instructed that a police officer has a right to arrest a person without a warrant whenever that person commits a public offense in his presence. Eluding the police and driving in excess of applicable speed limits are public offenses.

We further ask the Court to instruct the jury under 220S181 of the Oklahoma statutes that under the law of the State of Oklahoma, you're instructed that if an officer observes a motorist avoid a roadblock established by the officer, he is justified to stop that motorist and investigate.

And we object — I don't have the number of the instruction here — that the Court has stated regarding the law of the State of Texas. I'll make my objection that we object to the instruction that the law of the State of Texas prevent a peace officer from the State of Oklahoma to make an arrest or detain a person who has or is committing a crime in his presence. It is our belief that Article 14051 of the Texas statutes does not so hold, and thus the instruction is [816] erroneous and constitutes an improper statement of the law.

We ask the Court to instruct the jury that the law of the State of Oklahoma and in particular, 504(b), I believe, provide that if an operator of a motor vehicle willfully attempts to avoid a roadblock without receiving permission from a peace officer in attendance, he is guilty of a felony.

We would ask the Court to, in connection with — in addition to the good-faith instruction requested, that the evidence in this case showed that the County has complied in all respect with all state regulations and training and hiring and, therefore, it's to be considered in your deliberations as to whether or not the inadequate hiring or training of its officers constituted a municipal policy and/or custom.

We would ask the Court to instruct to the contrary of what it did. In this sense, we ask that you instruct the jury that if you should find that the sheriff's deputy force in general was not inadequately trained or had the custom of using inexperienced trained officers, then you shall find that the County is not liable under 1983.

We would ask the Court to instruct the jury there is no constitutional prohibition against an arrest or investigation

where probable cause exist. For there to be a probable — strike that. We've gone over that — I'm [817] repeating myself, Judge.

We would object Interrogatory Number 6 for the reason that it does not — first, for the reason that there's no evidence which holds, which supports the submission of the interrogatory for the reason that there is no showing that the hiring policy of the County was any different with respect to Stacy Burns and someone else, and the hiring policy inquired about has — asks the jury to consider only the case of Stacy Burns. Stated in a different way, the jury is asked whether B.J. Moore instituted a hiring policy with respect to Stacy Burns that was inadequate, et cetera. And the cases hold that that in and of itself is an improper inquiry.

Secondly, we object to the interrogatory because there is no evidence of a hiring policy in the case of Stacy Burns being the same policy that applied to the other officers, and that if he hired Stacy Burns differently than he hired other officers, then that should be so stated in the instruction and it would not be grounds for official misconduct of a customer policy.

THE COURT: Any more, Counsel?

MR. JACK KENNEDY: I have some more, Your Honor. I'm sorry I can't do better but I . . .

We object to Interrogatory Number 6 for the reason that there has been no pleading to support the Interrogatory [818] Number 6. The interrogatory does not use the word "custom"

as required by *Minell* and other cases. The used of the word "needs" rather than the word "rights" of the Plaintiff I think is improper. It allows the jury to consider the one hiring, one incident rather than a policy of hiring all of its officers, in direct violation of the case of the *Tuttle*, *Minell*, *Langerand*, *City of Kent vs. Harris*, *Rodriguez vs. Laveda* and others. It does not identify what action in the hiring of Stacy Burns was inappropriate or inefficient. It does not allow the good-faith defense in the interrogatory, and there's no evidence in the Charge of the institution of a policy by B.J. Moore.

With respect to Interrogatory Number 7, object to the use of Interrogatory Number 7 for the reason that there is no evidence to support that he had a separate training policy in the case of Stacy Burns or that the training policy of Bryan County was inappropriate, improper in any way. And thirdly, that a policy other than complying with 3311 and going to Cleat, could be inadequate and amount to deliberate indifference. Unless the interrogatory inquires of a general training policy specifically stated by the pleadings and evidence that the training of Stacy Burns was in keeping with the other — in keeping with his policy, then how he did as to this one officer is not an ultimate inquiry to go to the jury.

[819] The interrogatory comments that the sheriff has instituted a training policy with respect to Stacy Burns that was in keeping with the — apparently in keeping with the policy that had been going on forever during his tenure when there's no evidence to support, and certainly there's no evidence that it was inadequate, to amount to deliberate indifference.

Appendix E

We object to the interrogatory because it does not — is not based upon any instruction in the Charge that shows specific deficiency which led to the misconduct. And there is no testimony that the training required of Stacy Burns had exhibited a pattern in the times previous to this incident which would lead the County to assume and believe that the incident caused by Stacy Burns was a result of inadequate training. This goes to the ultimate question without sufficient preliminary interrogatories asking about specific training or lack thereof.

We object to the statement at Page 8 of the Charge reading that Sheriff B.J. Moore, although not allowing Stacy Burns to carry a gun or operate patrol cars, he was allowed to physically seize citizens, restrain them, and place them under arrest when there is no pleading in the — or showing in the joint pre-trial order that that was a contention, and certainly there was no showing that that was a policy of the, or custom of the County which led to the incident in [820] question.

We object to the sentence on Page 11 reading as follows: On the other hand, under the law of Oklahoma under the law, an Oklahoma law enforcement officer has no right to pursue a citizen into Texas for a misdemeanor to make an arrest, for the reason that that is an incorrect statement of the law under 1983.

Under 1983, under *Terry vs. Ohio* and all the other cases, we think that the law is that a police officer has a right to pursue and make an investigatory stop and that this would in effect tell the jury that they crossing of the state line is a

wrong and that Robert Morrison violated the law in doing so.

We object to the last sentence of Paragraph — on that last paragraph on that page reading: Furthermore, any person who willfully attempts to avoid a roadblock or checkpoint is guilty of a misdemeanor, for the reason, under 540(b) of the Statute of Oklahoma, he is guilty of a felony.

Generally, Your Honor, it is the contention of the Defendant that we feel that the Charge is generally insufficient in that does it does not require of the Plaintiff to plead and prove that there was a particular deficiency in the training and hiring policy of the County which has been established in the evidence, and that we ask for such instructions under Rule 51, that would require the [821] Court to instruct and submit interrogatories finding that the, or showing that one incident of police misconduct or one incident of violation of hiring and training policy cannot in and of itself constitute a policy and cannot grant the right to consider liability on the County in behalf of the Plaintiff.

Finally, on behalf of Stacy Burns, additionally, we ask the Court to find as a matter of law that Stacy Burns had qualified immunity. Secondly, that as a matter of law under the Oklahoma Tort Claims Act, if he was acting in his capacity as a reserve deputy, there cannot be any liability upon him for negligent acts taken in the line of duty.

THE COURT: Anything further?

MR. JACK KENNEDY: Nothing further, Your Honor.

Appendix E

THE COURT: The Defendants objections are overruled.

The jury will be instructed to begin their deliberations, and the Court will be in recess awaiting a verdict.

(Recess from 12:43 p.m. to 4:25 p.m.)

THE COURT: We have received the following notes from the jury: Please explain in laymen's terms the Doctrine of Qualified Immunity.

Two, does Interrogatory Number 2 pertain directly to Stacy Burns.

[822] The Court would propose to answer these two questions as follows: In answer to Question Number 1, I refer to the instructions previously given by the Court.

In answer to Question Number 2, I would answer it, the answer is "yes."

Does the Plaintiff have any objections or suggestions for answering the questions differently?

MR. WALKER: We have no objection, Your Honor.

MR. JACK KENNEDY: No objections.

THE COURT: All right. That's the way it will be answered then.

(Recess from 4:27 p.m. to 4:45 p.m.)

Appendix E

THE COURT: Be seated.

Bring the jury in.

(Jury entered the courtroom at 4:46 p.m.)

THE COURT: You may be seated.

Ms. Reeder, do you speak for the jury?

FOREPERSON REEDER: Yes, sir, I do.

THE COURT: And has the jury reached a verdict?

FOREPERSON REEDER: Yes, sir, we have.

THE COURT: Is it a unanimous verdict?

FOREPERSON REEDER: Yes, sir, it is.

THE COURT: You may pass it to the security officer.

THE COURT: Members of the jury, I'm going to have [823] your verdict published now by having the Clerk read it. Pay close attention because after it has been read, I will poll you to be certain that that is the verdict of each one of you.

The Clerk will now read the verdict.

4:91cv229. Jill Brown vs. Stacy Burns and Bryan County, Oklahoma. Verdict of the jury:

Appendix E

Interrogatory Number 1: Do you find from a preponderance of the evidence that Stacy Burns arrested Jill Brown without probable cause on May 12th, 1991? Answer: We do.

Interrogatory Number 2: Do you find from a preponderance of the evidence that Plaintiff's claim for false arrest is barred under the Doctrine of Qualified Immunity as instructed by the Court? We do not.

Interrogatory Number 3: Do you find from a preponderance of the evidence that Stacy Burns employed excessive force upon the Plaintiff on May 12th, 1991? Answer: We do.

Interrogatory Number 4: Do you find from a preponderance of the evidence that Plaintiff's claim for excessive force against the Defendant Stacy Burns is barred under the Doctrine of Qualified Immunity as instructed by the Court? Answer: We do not.

Interrogatory Number 5: Do you find from a [824] preponderance of the evidence that Defendant Stacy Burns is liable to the Plaintiff for false imprisonment? Answer: We do.

Interrogatory Number 6: Do you find from a preponderance of the evidence that the hiring policy of Bryan County in the case of Stacy Burns as instituted by its policymaker, B.J. Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff? Answer: We do.

Appendix E

Interrogatory Number 7: Do you find from a preponderance of the evidence that the training policy of Bryan County in the case of Stacy Burns as instituted by its policymaker, B.J. Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff? Answer: We do.

Interrogatory Number 8: Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the hiring of Reserve Deputy Sheriff Stacy Burns? Answer: We do.

Interrogation Number 9: Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the training of Reserve Deputy Sheriff Stacy Burns? Answer: We do.

Interrogatory Number 10: What sum of money, if any, do you find from a preponderance of the evidence would [825] fairly and reasonably compensate the Plaintiff for any damages proximately caused by the Defendant Stacy Burns or the Defendant Bryan County, acting through its policymaker, Sheriff B.J. Moore? Answer: Past physical pain, $5,000. Future physical pain, $10,000. Past mental pain and anguish, $1,000. Future mental pain and anguish, $1,000. Past physical impairment, $75,000. Future physical impairment, $360,000. Past disfigurement, $1,000. Future disfigurement, $2,000. Loss of income in the past, $36,000. Loss of earning capacity in the future, $180,000. Deprivation of constitutional right not to be subjected to excessive force, $50,000. Deprivation of constitutional right for loss of liberty, $50,000. Damage to reputation, five hundred. Past

medical expenses, $65,802. Future medical expenses, $90,000.

Interrogatory Number 11: What is a reasonable fee for the necessary services of Plaintiff's attorneys in this case stated in dollars and cents? For preparation and trial, $65,000. For an appeal to the Court of Appeals, 12,500. For making and responding to an application for Writ of Certiorari to the United States Supreme Court, 5,000. If application of writ is granted by the Supreme Court of the United States, 5,000.

Interrogatory Number 12: What sum of money, if any, do you find in your discretion should be assessed against the Defendant Stacy Burns as exemplary or punitive [826] damages for the constitutional violation suffered by the Plaintiff? Answer: $20,000. Date 4/19/93, Debbie Reeder, Foreperson.

THE COURT: Ms. Reeder, is that your verdict?

FOREPERSON REEDER: Yes, sir, it is.

THE COURT: Mr. Fullington, is that your verdict?

JUROR FULLINGTON: Yes, it is, Your Honor.

THE COURT: Mr. Andrews, is that your verdict?

JUROR ANDREWS: Yes, it is, Your Honor.

THE COURT: Mr. Richards, is that your verdict?

JUROR RICHARDS: Yes, it is, Your Honor.

THE COURT: Ms. Russell, is that your verdict?

JUROR RUSSELL: Yes, it is, Your Honor.

THE COURT: Mr. Lagos, is that your verdict?

JUROR LAGOS: Yes, Your Honor.

THE COURT: Ms. Irwin, is that your verdict?

JUROR IRWIN: Yes, it is, Your Honor.

THE COURT: Mr. Barnes, is that your verdict?

JUROR BARNES: Yes, Your Honor.

THE COURT: All right. The verdict, then, will be filed.

I thank you, ladies and gentlemen of the jury, for your long and diligent service as jurors in this case. Our judicial system could not function without the function of jurors. They're indispensable. And so you have, indeed, [827] rendered a valuable service to your system.

I remind you that under the rules of this Court you do not have to discuss your service as jurors in this case with anyone unless ordered to do so by the Court. And furthermore, the attorneys in the case are not to contact you about your service in this case unless — without first obtaining the permission of the Court.

Again, I thank you. And you may now pass from the courtroom.

(The jury left the courtroom at 5:55 p.m.)

THE COURT: If there is nothing further at this time, the Court is adjourned.

MR. JACK KENNEDY: Your Honor, when can I make my objection that —

THE COURT: I will advise the report that I had indicated earlier in the day in the absence of the court reporter that I would — this was before the case was submitted to the jury, that I would permit Mr. Kennedy to make an objection, an additional objection to the Charge and consider that it was timely made.

You may now do that, Mr. Kennedy. And the remainder of you may be seated.

MR. JACK KENNEDY: Your Honor, the Defendant further objects to the failure of the Court to submit an issue inquiring or allowing the jury to proportion the [828] issues, the amount of negligence between Stacy Burns and Jill Brown. Since the disputed testimony was raised to the action of Jill Brown which may be believed by the jury in bringing about the action of Stacy Burns, that, therefore, under the law of the State of Texas, the comparative negligence of the parties should have been submitted — should be submitted to the jury in order that the jury would have an opportunity to find, if they wanted, that Jill Brown's negligence was involved and should be compared with that of the Plaintiff.

Further, that since the matter of the joint enterprise was tried with consent, that the negligence of Ms. Brown should be considered in light of the actions of her husband, Rodney Todd Brown.

We would ask that the Court submits an issue similar to that of the 5th Circuit Pattern Jury Instruction, Civil Law Number 1(a), or issues similar to that.

THE COURT: As I advised Counsel at the time that the request was made and as I now state for the record, the request is denied.

The Court is adjourned.

(Proceedings adjourned at 5:57 p.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ [illegible] 6-25-93
COURT REPORTER DATE

Supreme Court, U.S.
FILED
MAR 28 2001
OFFICE OF THE CLERK

No. 00-1311

In The

Supreme Court of the United States

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

v.

JILL BROWN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's determination that Jill Brown produced legally sufficient evidence of inadequate municipal training is in conflict with this Court's § 1983 precedent, despite the Fifth Circuit's fact-intensive application of the precise legal standards set out in *Canton v. Harris* (and reconfirmed in *Bryan County v. Brown*) for adjudicating inadequate training claims?

2. Whether a County whose official policymaker authorizes a rookie officer to make forcible arrests prior to his receiving any training regarding when and how to apply force to a citizen should nevertheless escape liability under § 1983 for that officer's highly predictable violation of a citizen's right to be free from excessive force?

3. Whether the distinction drawn by this Court in *Bryan County v. Brown* between a municipal hiring decision and a municipal training decision, based as it is on the special difficulties of establishing the requisite causal nexus between a municipal *hiring* decision and a subsequent employee-perpetrated constitutional deprivation, permits an injured citizen to prevail on a theory of inadequate training despite her inability to prevail on a theory of inadequate hiring?

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STATEMENT OF THE CASE

The Fifth Circuit's holding that Bryan County's official law enforcement policymaker acted with "deliberate indifference," by authorizing a rookie officer to make forcible arrests before that officer had received any training regarding when and how to apply force to a citizen, rests on a straightforward application of this Court's precedent to an egregious set of facts. The Fifth Circuit's fact-intensive resolution of this case cannot fairly be characterized as "in conflict with" this Court's precedent, because it rests on a careful application of the standards enunciated in *Canton v. Harris*, 489 U.S. 378 (1989), and reconfirmed in *Bryan County v. Brown*, 520 U.S. 397 (1997), for adjudicating a § 1983 claim of inadequate municipal training. Nor has Petitioner even attempted to argue a circuit split; there simply isn't one. No circuit has held that a municipal policymaker is free to deliberately authorize rookie officers to make forcible arrests before receiving *any* training, much less adequate training, regarding when and how to apply force to a citizen.

With respect to inadequate *training* claims, this Court in *Bryan County* confirmed that which Jill Brown has consistently maintained is evident from *Canton*: that municipal liability may be based on a policymaker's deliberately indifferent failure to train a single officer to adequately handle those recurring constitutional obligations – such as avoiding excessive force – that inhere in a police officer's job. 520 U.S. at 409-410. Thus, the Fifth Circuit's holding does not conflict with this Court's precedent; rather, it is Petitioner's view of the case that conflicts with this Court's pronouncements, in both *Canton* and *Bryan County*, governing municipal liability for inadequate training.

Not only does Petitioner fail to identify any material conflict between the Fifth Circuit's ruling and the precedent of this Court, or that of any other court, but the case as it currently stands involves neither a novel legal issue nor any novel application of the law that threatens

municipalities with undeserved liability. The only novelty to this case was the *hiring* claim, which depended on borrowing *Canton*'s settled analysis of training claims and applying it in a hiring context. This Court explained in *Bryan County* that it was not that simple, emphasizing the differences between hiring claims and training claims. 520 U.S. at 409-410. With this Court's resolution of the *hiring* issue, the present case currently stands devoid of anything novel. All that remains is a straightforward application of those principles in *Canton* that govern training claims, principles that this Court in *Bryan County* expressly reconfirmed as applicable to training claims.

What the Fifth Circuit's holding means for counties and other municipal subdivisions is this, and only this: *Don't authorize rookie officers to make forcible arrests before they have had any force-related training*. Even the barest effort to provide force-related training to rookie officers will distinguish future cases from the present one. And counties remain entirely free to provide *no* force-related training to a rookie officer so long as they withhold from that officer the authority to make forcible arrests until such training is provided by others, like a police academy. Due to the unusual and egregious facts in the present case, and the Fifth Circuit's fact-intensive resolution of the training issues herein, this case will surely be aggressively cited by municipal subdivisions seeking to avoid liability by claiming, "We did more than Bryan County; we did something; we made an effort." And by setting the bar this high, the Fifth Circuit has ensured that future Fifth Circuit panels will virtually always have factual grounds to distinguish its *Bryan County* holding.

(a) Statement of Facts

Throughout its Petition, Bryan County repeatedly ignores the standard of review of a jury verdict *adverse* to the County, going so far as to describe certain evidence as "undisputed" despite conflicting testimony that the jury

was entitled to believe. Moreover, Bryan County conveniently omits mention of the wealth of evidence showing that it acted with deliberate indifference when its official policymaker on matters of hiring and training police officers, Sheriff B.J. Moore,[1] decided to authorize his nephew, Stacy Burns, to make forcible arrests despite wholly inadequate force-related training.

Stacy Burns testified that, prior to beginning work as a reserve officer, he had no experience as a law enforcement officer. Tr. 602. While all rookie cops require training to handle those recurring situations that commonly confront police officers – such as whether to use force on a citizen and how to apply that force to avoid unnecessary injury – a municipality's knowledge about the background and character of any particular rookie is obviously relevant to that officer's training needs. At the time Bryan County hired him to be a law enforcement officer,[2] the youthful Burns had already accumulated a lengthy criminal record of arrests and convictions: Assault, Resisting Arrest, Public Drunkenness, Driving While Intoxicated, False Identification, Driving While

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[1] Pretrial, the County stipulated that "[a]t all times relevant hereto, Defendant [Sheriff] Moore was the policymaker for Bryan County regarding the Sheriff's Department." R. Vol. 3, p. 854. The County made no objection to the portion of the jury charges that stated, "Sheriff B.J. Moore is an official whose acts constitute final, official policy of Bryan County, Oklahoma." Tr. 800. The County never raised the issue in its first appeal to the Fifth Circuit, and the Fifth Circuit noted that it had been waived. *Brown v. Bryan County*, 67 F.3d at 1182 n.17.

[2] Although the "bad hiring" claim is no longer at issue, the information that the County acquired about Burns before employing him is relevant not only to whether the County should have hired him (which is no longer at issue) but additionally relevant to whether the County adequately *trained* him to make force-related decisions in encounters with citizens (which *is* at issue).

License Suspended (three counts), and nine moving traffic violations. Tr. 317-320, 572-576. Sheriff Moore was aware of Burns' lengthy criminal history. Tr. 323-324, 648, 672-673. Although Moore claimed never to have read Burns' rap sheet carefully, Tr. 673, he excused his inattention to Burns' record with the explanation: "He had a long record." Tr. 673.[3] Despite Sheriff Moore's awareness that Burns had a long criminal record, despite the absence of a background investigation which would have shed additional light on Burns' character,[4] and despite Moore's knowledge that Burns was a "rookie" officer, Moore made the conscious decision, pursuant to his status as the decisionmaker for Bryan County, to authorize Burns to make arrests, including forcible arrests, Tr. 604, prior to Burns receiving virtually any training of any kind, much less adequate training regarding when and how to apply force to a citizen.

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[3] Of course, as the Fifth Circuit noted the first time it reviewed this case, it is possible that the jury did not believe Sheriff Moore when he professed ignorance of some of the more serious details of his nephew's record. 67 F.3d at 1184. Indeed, Moore also testified that he did not consider a history of misdemeanor arrests and convictions to be a "criminal record," Tr. 674, explaining that he did not believe that "assault and battery would stop anybody from being a good police officer. . . . " Tr. 648. Moore's twisted beliefs arguably explain, but certainly do not justify, his decision to authorize Burns to make forcible arrests prior to Burns receiving any meaningful training regarding either when or how to make a forcible arrest.

[4] Sheriff Moore admittedly made no further inquiry into the disposition of any of the charges or convictions, and made no attempt to determine whether Burns was currently on probation. Tr. 673-675. If he had, he would have discovered that there was an outstanding warrant for Burns' arrest for violating conditions of probation. Tr. 318-320, 620-622. Burns not only failed to pay fines and failed to perform community service, he also violated his probation by continuing to commit crimes including assault, public drunkenness, driving while license suspended, and false identification. Tr. 319-320.

Despite Burns' lack of experience, and his checkered recent past, Bryan County Sheriff's Department provided no formal departmental training to Burns. Tr. 600-605. Indeed, the County had no formal training program at all. Tr. 325, 327-331, 358, 600-602, 675-676. Although Burns stated in his deposition that he had received no training at all through Bryan County, formal or otherwise, he remembered at trial that he had viewed one or more television programs broadcast on a state law enforcement training channel, Tr. 579, 601, and that he had ridden with his grandfather, Reserve Deputy Calclazier, "several" times in civilian clothes prior to being hired. Tr. 579. Burns recalled no other aspects of his informal training by Bryan County officers, and made no effort to claim that anyone at Bryan County explained to him *how* to put a citizen on the ground without causing unnecessary injury, much less *when* it was appropriate to do so. *See* Tr. 600-605.

Bryan County's reliance on the training Burns allegedly received at Oklahoma's law enforcement training academy (known as CLEET) is wholly disingenuous. Although that may be a fine program for those rookie officers who actually attend and complete the course, Burns did not even apply for classes until May 6, 1991, a scant 6 days prior to his use of excessive force against Jill Brown. Tr. 516-517. Because the classes were held only three days a week, Tr. 578, Burns had at most three sessions of CLEET training prior to injuring Jill Brown. But the jury also could have found that Burns had not attended *any* CLEET classes prior to his attack on Jill Brown. After claiming in his deposition that he had received several months of CLEET training prior to May 12, 1991 (the Jill Brown incident), Burns suffered a memory loss at trial (regarding the number of CLEET classes he had attended) after plaintiff established that he had not even applied for CLEET training until May 6, 1991. Tr. 516, 577, 600, 608. Moreover, the jury was familiar with Burns' criminal record, which revealed a disregard both for the law and for truthfulness (the false identification);

and he also admitted lying under oath during his deposition. Tr. 576-577. Other evidence also shows that Burns attended *no* CLEET classes prior to his use of excessive force against Jill Brown. One form that had to be completed before Burns could be accepted into the CLEET program was dated May 30, 1991, eighteen days after he injured Jill Brown. Tr. 402-404. Burns' Employment Status Sheet, which must be filed with CLEET within ten days of hire, is dated June 12, 1991, thirty days after the Brown incident, and in excess of two months after he was hired. Tr. 400-402. Thus, it is simply not true, despite Petitioner's claim at page 5 of its Petition, that it was "undisputed" that Burns received force-related training at CLEET.

Burns' general lack of training was also reflected in the absence of any specific instruction regarding situations likely to arise while conducting a "state line" road block in an alleged "high crime" area. Tr. 649. To wit, Burns received no training regarding roadblock procedures, Tr. 602, 605, 679-680, no training regarding pursuit across state lines, Tr. 602, and no training regarding his authority to arrest in Texas. Tr. 603. Moreover, he received no supervision during the incident involving Jill Brown, Tr. 603-604, and no instructions during the pursuit. Tr. 609. Despite this absence of training, experience, and supervision, Sheriff Moore authorized Burns to make forcible arrests. Tr. 604. Burns apparently enjoyed this authority since, of his first thirteen arrests, he forced the arrestee to the ground at least *five* times, Tr. 628, a record of force that plaintiff's law enforcement expert characterized as "unusually high and excessive." Tr. 394. Despite Bryan County's knowledge that Burns was consistently taking citizens to the ground, the County produced no evidence that it responded to its knowledge of Burns' common practices with either training or supervision. In other words, the County's lax attitude toward the training and supervision of Burns continued.

Not surprisingly, the constitutional deprivation that Burns inflicted on Jill Brown is precisely the one – excessive force – that was highly predictable given Burns' background, his lack of experience, his lack of training and supervision (both generally as well as specifically in regard to those recurring force-related decisions that are inherent in the job of police officer), and his continued lack of training despite a demonstrated tendency to take citizens to the ground. Although the jury's finding that Burns subjected Jill Brown to excessive force is no longer in dispute, the details of the incident are still helpful in showing just how closely linked Burns' unconstitutional conduct is to Bryan County's failure to adequately train and supervise him. Jill Brown was a passenger in a pickup truck driven by her husband, Todd Brown. Shortly after crossing the Texas state line, Todd Brown saw a roadblock in Oklahoma, turned around and drove back into Texas, and was stopped by Bryan County officers shortly thereafter on a side road that led to his mother's house.[5] Jill Brown testified that, after the stop,

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[5] Mr. Brown testified that he was familiar with the checkpoint and chose not to go through it because he had been unnecessarily detained there on prior occasions for up to fifteen minutes. Tr. 134. The Browns previously had contacted Oklahoma officials about these roadblocks near the Texas border, complaining about unnecessary delays and being hassled by the deputies. Tr. 41-42, 134. Indeed, this Court has recently held that such general investigatory roadblocks are unconstitutional. *Indianapolis v. Edmond*, ___ U.S. ___, 121 S.Ct. 447, 458 (2000). Mr. Brown decided to turn around and spend the night at his mother's home, which was a few miles back across the border in Texas. Tr. 134, 138. When turning around, his tires did not squeal and did not throw any gravel. Tr. 135. He neither turned around, nor came out of the turn, nor drove back toward Texas, at a high rate of speed. Tr. 136-137. After crossing the dam into Texas, he turned off the main road, taking his normal route to his mother's house. Tr. 138-139. After he realized the police were following him, he pulled off the road at the first available safe opportunity. Tr. 142-43. The Browns were

she heard two commands to get out of the vehicle, was doing exactly what Burns told her to do, and was not slow to respond. Tr. 53-54, 94. After starting to exit the vehicle with her hands in the air, Burns grabbed her by the left arm, spun her around, and "threw" her to the ground. Tr. 52-53. Although the County continues to characterize an "arm bar" technique as the "lowest level of force" available, Petition, at 5, that description assumes a *properly executed* arm-bar takedown, not spinning someone around and throwing them hard to the pavement. Tr. 392, 541. Moreover, there was no need to use *any* degree of force on Jill Brown. Tr. 347-348. Ms. Brown was not able to break her fall as one hand was in the air and Burns had hold of the other. Tr. 53. She landed on the pavement, knees first, with Burns' knees in her back. Tr. 54-55.[6] The Fifth Circuit found sufficient evidence to support the jury's finding that Burns used excessive force. 67 F.3d at 1180.[7] As a result of Stacy Burns' actions, Jill Brown has had four operations, two on each knee, and

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not intoxicated, nor did they have any motive for avoiding the roadblock other than their desire to avoid harassment. Tr. 49, 159.

[6] When Jill Brown cried out upon being thrown to the pavement, Todd Brown attempted to check on his wife's condition and was repeatedly punched. While being beaten, Mr. Brown says he exclaimed, "This is just like L.A., huh, boys," to which Burns responded, "No, this is a hell of a lot worse." Tr. 150. Burns later returned to where Jill Brown lay on the pavement, arms handcuffed behind her back, and jerked her up by the chain between the cuffs. Tr. 57.

[7] The Fifth Circuit also found sufficient evidence to support the jury's finding of false arrest and false imprisonment. 67 F.3d at 1180-81. Jill Brown had committed no crime, yet, after being slammed to the pavement, she remained handcuffed there for approximately one hour, during which time she was never informed why she was being detained. *Id.* And no charges were ever brought against her. *Id.* at 1181.

will require additional surgery, eventually culminating in total knee replacements. Tr. 261, 267-272.

(b) Course of Proceedings

At trial, Jill Brown established the three elements necessary to demonstrate that Bryan County was sufficiently at fault for its employee's constitutional tort to justify the imposition of § 1983 *municipal* liability: 1) an official municipal decision by a policymaker (*i.e.*, a "policy") made with 2) deliberate indifference, which 3) directly caused the constitutional deprivation. First, Bryan County conceded that Sheriff Moore was the County's official policymaker with exclusive and final policymaking authority regarding the hiring and training of county law enforcement officers, including Officer Burns. R. Vol. 3, pp. 854, 862. Second, the jury's verdict expressly found that the County, through its policymaker on matters of hiring and training, was deliberately indifferent to Jill Brown's constitutional rights, both with respect to the improper hiring and inadequate training of Burns. Tr. 824. Third, the jury found that Jill Brown's injuries (from the excessive force) were directly caused by the deliberate indifference of Bryan County's official policymaker. Tr. 800, 824-825. The Fifth Circuit affirmed the jury's verdict of municipal liability, finding that the jury's verdict was supported by the evidence. *Brown v. Bryan County*, 67 F.3d 1174, 1185 (5th Cir. 1995).[8] Bryan County

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[8] In its Petition, Bryan County repeatedly cites a superceded Fifth Circuit panel opinion, 53 F.3d 1410 (5th Cir. 1995) (superceded by 67 F.3d 1174), as "*Brown I.*" Petition, at 10-11, 23, 29. Not only is this terribly misleading, but Petitioner apparently does not appreciate the meaning of "superceded." Indeed, in its "Table of Authorities," Petitioner does not even acknowledge that 53 F.3d 1410 is legally nonexistent. It is true that, in that superceded opinion, the panel during the first appellate incarnation of this case originally ruled that Jill Brown's hiring claim was a winner but that her training claim

filed a Petition for Writ of Certiorari, asking this Court to review the *hiring* aspects of the case. (Bryan County did not raise a challenge in its Petition for Writ of Certiorari to the inadequate *training* portion of Jill Brown's verdict, which the Fifth Circuit left undisturbed and undiscussed, stating early in its opinion, "[f]or efficiency's sake, we will address only those points that we believe merit review." 67 F.3d at 1178.) This Court granted review, and held that the County was not liable based on a theory of inadequate *hiring*. 520 U.S. 397 (1997). Throughout its opinion, however, this Court consistently distinguished hiring claims from training claims in a way that directly supports affirmance of the jury's verdict that Bryan County's deliberately indifferent failure to adequately *train* Burns directly resulted in the constitutional injury that Jill Brown suffered at the hands of Burns. *See id.*, at 409-410. Moreover, this Court in *Bryan County* expressly approved the theory of municipal liability for inadequate training that was reserved in *Canton*, the theory upon

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was a loser. That opinion was superceded by the opinion at 67 F.3d 1174, which *deleted* the portion of the original opinion that had branded the training claim a loser. Apparently, the Fifth Circuit appreciated what this Court later made clear with its own *Bryan County* opinion – that Jill Brown's training claim is actually far *stronger* than her hiring claim. That would explain why, in its *ultimate* opinion, the Fifth Circuit classified Petitioner's challenge to Jill Brown's *training* victory as not even meriting review. 67 F.3d at 1178. This Court expressly noted the Fifth Circuit's resolution of the training issue, and left it undisturbed. *See* 520 U.S. 397, 402 (1997). ("The [Fifth Circuit] addressed only those points that it thought merited review; it did not address the jury's determination of county liability based on inadequate training of Burns, [67 F.3d] at 1178, nor do we.") Thus, although Petitioner complains, at page 4 of its Petition, of the "tortuous procedural route" this case has taken, the only "tortuous" aspect of the route is how Jill Brown was effectively required to win affirmance of her favorable verdict on training a *second* time, when that part of her victory was arguably already the "law of the case."

which Jill Brown's training claim expressly stands. *Id.*, at 409.

On remand, not surprisingly, both the District Court and the Fifth Circuit accepted at face value this Court's distinction between hiring and training claims. R. Vol. 4, 1078-1079; 219 F.3d 450, 461 (5th Cir. 2000). Both the District Court and the Fifth Circuit also noted this Court's reaffirmance of those portions of *Canton* on which Jill Brown's training claim expressly rests. R. Vol. 4, 1078-1079; 219 F.3d at 460-461. Thus, the District Court reentered judgment for Jill Brown based on the favorable jury verdict she had received on her training claim, R. Vol. 4, 1093-1094; and the Fifth Circuit affirmed based on its fact-intensive application of *Canton*'s settled analysis of training claims. 219 F.3d at 462-465.

SUMMARY OF ARGUMENT

Although this Court in *Bryan County* found the absence of a sufficiently direct causal link between Jill Brown's constitutional injuries and the County's decision to *hire* Burns, nothing in the Court's opinion casts doubt on the propriety of the inadequate *training* portion of the jury's verdict in favor of Jill Brown. Indeed, this Court's analysis of the hiring issue rested heavily on a distinction between hiring and training claims that made it inappropriate to "import the reasoning of *Canton* into the hiring context." 520 U.S. at 410. Nevertheless, this Court expressly approved the continued vitality of the *Canton* reasoning in the *training* context, and further explained *Canton* (as it relates to training) in a way that directly supports the Fifth Circuit's affirmance of the jury's "inadequate training" verdict in favor of Jill Brown. *Id.*, at 409-410.

First, this Court's opinion in *Bryan County* expressly confirms that a claim of § 1983 municipal liability under *Canton* can be based on a County's deliberately indifferent failure to train a single officer, and can be established without showing a pattern of constitutional

violations. *Id.* According to the Court, deliberate indifference under *Canton* can be established by a failure to adequately train an officer to handle those recurring constitutional obligations that an officer is certain to face, such as those obligations relating to the use of police force against citizens – *e.g.*, whether to use force, how much force to use, and how to apply that force so as to avoid unnecessary injury. *See* 520 U.S. at 409-410. Because of the recurring nature of the obligation, the municipality is on notice of the need to train officers (especially a rookie officer) even *prior to* a pattern of officer uses of excessive force against citizens. *See id.*, at 409. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights justifies a finding that the policymakers' decision not to train the officer constitutes deliberate indifference toward a particular constitutional right of citizens, namely, the right to be free from excessive force. *See id.* With respect to the causation issue, the Court added, "[t]he high degree of predictability [that the failure to adequately train will lead to a particular constitutional violation] may also support an inference of causation – that the municipality's indifference led directly to the very consequence that was so predictable." *Id.*, at 409-410.

Jill Brown's theory of inadequate municipal training precisely follows the *Canton* theory that was expressly approved in *Bryan County*. First, she produced legally sufficient evidence of the County's deliberate indifference to Burns' obvious need for force-related training. Burns was a rookie officer with no law enforcement experience, Tr. 602, and the decision whether and how to apply force to citizens is a recurring situation that all police officers must be adequately trained to handle. Moreover, the County's policymaker, Sheriff Moore, had special knowledge about Burns (his lengthy criminal record revealing, at best, an individual with a lax attitude toward the law) that also shed light on Burns' need for training. Tr. 323-324, 648, 672-673. Despite Burns' lack of experience

and questionable character, he received no formal departmental training of any kind from Bryan County. Tr. 600-605. Indeed, the County had no formal training program at all. Tr. 325, 327-331, 358, 600-602, 675-676. Nor did Burns receive anything amounting to adequate *in*formal departmental training from the County. Although Burns stated in his deposition that he had received no training at all from the County, formal or otherwise, he remembered at the trial that he had viewed one or more television programs broadcast on a state law enforcement channel, and that he had ridden with his grandfather, a reserve deputy, "several" times in civilian clothes prior to being hired. Tr. 579, 601. Even if that qualifies as some informal departmental training, a jury reasonably could have found that it was dramatically short of that necessary to address Burns' training needs.

Bryan County's reliance on the training Burns allegedly received at Oklahoma's state training program (known as CLEET) is wholly disingenuous. Burns did not even apply for classes until May 6, 1991, a scant 6 days prior to his use of excessive force against Jill Brown. Tr. 516-517. Because the classes were held only three days a week, Tr. 578, Burns had at most three sessions of CLEET training prior to injuring Jill Brown. Indeed, there was evidence introduced on which the jury could have found that Burns had not attended *any* CLEET classes prior to his attack on Jill Brown. After claiming in his deposition that he had received several months of CLEET training prior to May 12, 1991 (the Jill Brown incident), Burns suffered a memory loss at trial (regarding the number of CLEET classes he had attended) after plaintiff established that he had not even applied for CLEET training until May 6, 1991. Tr. 516, 577, 600, 608. Perhaps most importantly, certain forms that had to be filed with CLEET prior to his acceptance into the training academy were dated weeks after Burns' confrontation with Jill Brown. Tr. 400-404.

Despite Burns' lack of experience, training, and supervision, Sheriff Moore authorized Burns to make

forcible arrests. Tr. 604. Burns apparently relished his authority to make forcible arrests since, of his first thirteen arrests, he forced the arrestee to the ground at least *five* times, Tr. 628, a record of force that Plaintiff's law enforcement expert characterized as "unusually high and excessive." Tr. 394. Because Bryan County has a small force and because the policymaker (Sheriff Moore) was Burns' uncle, Tr. 605, it would have been reasonable for the jury to infer that Sheriff Moore was aware of Burns' propensity to take citizens to the ground. Despite this, the County produced no evidence of training or supervision in response to Burns' common practices. In other words, the County's failure to adequately train Burns *before* setting him loose on the public was matched by its *continuing* failure to train him despite knowledge that his encounters with citizens were regularly escalating into uses of force.

Not only was Burns untrained, he received no supervision during the incident involving Jill Brown, Tr. 603-604, and no instructions during the pursuit. Tr. 609. Jill Brown's description of Burns' use of force – *i.e.*, that she was grabbed by the arm, spun around, and thrown hard to the pavement, Tr. 52-55 – certainly belies the notion that Burns used any legitimate "technique" for taking a citizen to the ground. Nevertheless, even assuming Burns was attempting such a "technique," Plaintiff's law enforcement expert testified that Jill Brown's description of Burns' conduct did not reflect an appropriate execution of the arm-bar technique. Tr. 392, 541. Moreover, there was no need to use *any* force against Jill Brown. Tr. 347-348.

Finally, because the constitutional deprivation suffered by Jill Brown (excessive force) was precisely the one that was so highly predictable given Burns' lack of adequate training to handle the quintessential recurring obligation that officers regularly confront – the obligation to avoid using excessive force against citizens – there is a patently obvious and direct causal link between the County's deliberately indifferent failure to adequately

train Burns to make and implement force-related decisions and Burns' use of excessive force against Jill Brown just a few weeks after the County authorized him to make forcible arrests. As this Court recently emphasized, the high degree of predictability that a training inadequacy will lead to a particular constitutional violation supports an inference of causation – *i.e.*, that the municipality's deliberate indifference led directly to the consequence that was so predictable. 520 U.S. at 409-410.

In sum, given the facts of this case, this Court's opinion in *Bryan County* expressly supports the Fifth Circuit's affirmance of the jury's verdict finding the County liable to Jill Brown under the inadequate training analysis originally approved in *Canton*. Thus, the Fifth Circuit's holding conflicts with neither *Canton* nor *Bryan County*, nor any other holding of this Court. Further, given this Court's earlier resolution of the *hiring* claim, this case no longer contains either a novel or a controversial issue. The Fifth Circuit's holding is merely a fact-intensive application of settled "failure to train" law to a unique and egregious set of facts. The Fifth Circuit holding, at most, stands only for the proposition that municipal subdivisions may be held accountable under *Canton* for excessive uses of force by rookie officers who have been authorized by municipal policymakers to make forcible arrests before they have had any force-related training.

ARGUMENT

I. This Court's *Bryan County* Opinion Expressly Supports Affirming the Jury's Verdict Imposing Municipal Liability Based on the County's Deliberately Indifferent Failure to Adequately Train Officer Burns to Handle the Recurring Constitutional Obligation to Avoid Subjecting Citizens to Excessive Force, the Very Obligation that Burns Breached When He Threw Jill Brown to the Pavement.

This Court's earlier ruling in this case knocked out only one of two alternative bases for the jury's verdict imposing municipal liability on Bryan County under

§ 1983. The jury's verdict against Bryan County, Oklahoma, was based on two separate and independent findings of deliberate indifference by Sheriff Moore, Bryan County's official policymaker on matters of hiring and training law enforcement officers. The jury found not only that Sheriff Moore was deliberately indifferent when *hiring* Stacy Burns, but also that Sheriff Moore was deliberately indifferent by not adequately *training* Stacy Burns before setting him loose on the public authorized to make forcible arrests. R. Vol. 10, pp. 823-825. Following the Fifth Circuit's first affirmance, 67 F.3d 1174 (1995), Bryan County requested certiorari only as to the hiring portion of the verdict, and this Court's decision in Bryan County's favor consequently resolved only the hiring issue. 520 U.S. 397, 402 (1997) ("The [Fifth Circuit] addressed only those points that it thought merited review; it did not address the jury's determination of county liability based on inadequate training of Burns, [67 F.3d] at 1178, nor do we."). Not only did this Court's ruling expressly leave the training pillar of Jill Brown's judgment intact, but the Court elsewhere in its opinion drew a distinction between claims based on faulty municipal hiring and those based on faulty municipal training, emphasizing that training claims will continue to be governed by the analysis in *Canton v. Harris*, 489 U.S. 378 (1989), and further explaining *Canton* in a way that directly supports the Fifth Circuit's decision, following remand from this Court, to uphold the jury's "inadequate training" verdict in favor of Jill Brown. *See* 520 U.S. at 409-410.

A. This Court's earlier opinion in this case drew a sharp distinction between claims of § 1983 municipal liability based on hiring and those based on training.

Central to this Court's reversal of Jill Brown's verdict on inadequate municipal hiring was its rejection of plaintiff's analogy between failure-to-train cases and inadequate pre-hire-screening cases. *See* 520 U.S. at 409-410.

The Court's distinction between hiring and training flows from its concern about whether there is a sufficiently direct line of causation between an inadequate municipal hiring decision and the hired employee's subsequent deprivation of a citizen's constitutional rights. *See id.*, at 410. ("Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a 'but-for' sense." Thus, "there is a particular danger [with inadequate hiring claims] that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself."). The Court's reasoning reveals that it considers poor municipal *hiring* decisions to be more remote from subsequent employee-perpetrated constitutional wrongs than poor municipal *training* decisions. *See id.* ("predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a special skill necessary to the discharge of his duties"). Of course, the "flip side" of that coin is that the line of causation between inadequate municipal *training* and a poorly trained employee's predictable constitutional violations will always be more direct than the line of causation between inadequate municipal *hiring* decisions and the poorly hired employee's subsequent constitutional torts. *See id.* (describing the risk from a particular glaring training omission as "'obvious' in the abstract.") In short, there is nothing in this Court's earlier opinion in this case that calls into question *Canton*'s continued vitality in inadequate training cases; nor is there anything in the Court's opinion that casts serious doubt on either the District Court's decision, or the Fifth Circuit's decision, on remand from this Court, to uphold the jury's "inadequate training" verdict in favor of Jill Brown.

B. This Court's opinion in *Bryan County* clearly confirmed that a claim of § 1983 municipal liability under *Canton* can be based on the inadequate training of a single officer, and can be established without pointing to a pattern of constitutional violations.

Both in its first Fifth Circuit appeal and in this Court, Bryan County relied heavily on a "single officer/single incident" theory – *i.e.*, that a municipality cannot be held liable under § 1983 in the absence of proof of a pattern of constitutional deprivations. Bryan County repeatedly urged both that Burns was the only officer proven to have been improperly hired/inadequately trained and that Jill Brown was the only citizen proven to have been deprived of her constitutional rights by Burns. This Court expressly did not rule in Bryan County's favor on this point. 520 U.S. at 412. We do acknowledge, however, that the Court's language was somewhat skeptical about claims of municipal liability based on a single *hiring* decision. *See id.* ("Even assuming without deciding that proof of a single instance of inadequate screening could ever trigger municipal liability . . . . "). Nevertheless, such skepticism toward § 1983 claims based upon a single *hiring* decision is in marked contrast to the Court's attitude toward § 1983 claims based on inadequate municipal *training*. *See id.* at 410 ("predicting the consequences of a single hiring decision . . . is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a special skill necessary to the discharge of his duties"). Indeed, with respect to inadequate *training* claims, this Court clearly confirmed that which Jill Brown has consistently maintained is evident from *Canton*: that municipal liability may be based on a policymaker's deliberately indifferent failure to train a single officer, even where that deliberate indifference results only in a single incident involving constitutional violations rather than a pattern of such violations. *Id.*, at 409-410.

Once again, it is apparent that this Court is treating hiring claims differently than training claims, the latter of which continue to be governed by *Canton*. Ironically, it is the Supreme Court's rejection of Plaintiff's attempt to apply *Canton* to hiring claims that clearly shows the way on the training issue:

> *In Canton, we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability.* 489 U.S., at 390, and n. 10 ("[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious . . . that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need"). Respondent purports to rely on *Canton*, arguing that Burns' use of excessive force was the plainly obvious consequence of Sheriff Moore's failure to screen Burns' record. In essence, respondent claims that this showing of "obviousness" would demonstrate both that Sheriff Moore acted with conscious disregard for the consequences of his action and that the Sheriff's action directly caused her injuries, and would thus substitute for the pattern of injuries ordinarily necessary to establish municipal culpability and causation.
>
> *The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open in Canton the possibility that a plaintiff might succeed in carrying a failure-to-train claim* ***without showing a pattern of constitutional violations,*** we simply hypothesized that, in a narrow range of circumstances, *a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that* ***an officer*** *lacking specific tools to*

> *handle that situation will violate citizens' rights could justify a finding that policymakers'* ***decision not to train the officer*** *reflected "deliberate indifference" to the obvious consequence of the policymakers' choice – namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation – that the municipality's indifference led directly to the very consequence that was so predictable.*

Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a "but-for" sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.

> *In attempting to import the reasoning of Canton into the hiring context, respondent ignores the fact that predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from* ***the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties.***

520 U.S. at 409-410 (emphasis added).

In light of this Court's earlier opinion in this case, it is apparent that Bryan County can no longer rely on the "single officer/single incident" approach that has been the primary thrust of its attacks on the jury verdict to this point. Although Bryan County somewhat backed away from its "every municipality gets one bite" argument in

the Fifth Circuit, Brief for Appellant, at 12, 17, it nevertheless demonstrates its reluctance to entirely let it go, despite the clear ramifications of this Court's opinion. *See* Petition, at 4, 17, 18, 19, 24. Not only did this Court refuse to adopt a *per se* "one bad hiring decision is not enough" view of municipal *hiring* liability under § 1983, it also cited with approval that portion of *Canton* that expressly permits municipal liability for the improper *training* of even a single officer. 520 U.S. at 409. Thus, under *Canton*, and under *Bryan County*, municipal liability can be founded upon the failure to adequately train a single officer for those recurring constitutional obligations that an officer is certain to face, such as those obligations relating to the use of police force against citizens – *i.e.*, whether to use force, how much force to use, and how to apply that force. *See Canton*, 489 U.S. at 390 & n.10; *Bryan County*, 520 U.S. at 409-410. And, when the training inadequacy relates to such a recurring constitutional obligation, both *Canton* and *Bryan County* emphasize that municipal liability does not depend on a plaintiff's ability to prove a pattern of prior similar constitutional deprivations suffered by others. *Bryan County*, 520 U.S. at 409, *citing Canton*, 489 U.S. at 390 & n.10.

For a municipality to be "deliberately indifferent" under *Canton*, it must have notice that the failure to adequately train an officer creates an obvious danger that the officer will violate a particular constitutional right. *Bryan County*, 520 U.S. at 409. (For example, Bryan County's wholesale failure to provide any "force-related" training before setting Officer Burns loose on the public authorized to make forcible arrests – and the County's continuing failure to provide Burns any "force-related" training despite knowledge that Burns was repeatedly taking citizens to the ground – created an obvious danger that Burns would violate a citizen's constitutional right, under the Fourth Amendment, to be free from an unreasonable seizure made with excessive force.) Although some form of "notice" that a failure to train poses an obvious danger of a particular constitutional deprivation

is indispensable to a finding of "deliberate indifference," *Canton* makes clear that notice of a need to train *does not always have to come from a pattern of constitutional deprivations*. *See* 489 U.S. at 390 & n.10; *see also* 489 U.S. at 396-397 (O'Connor, J., concurring). The notice *may* come from such a pattern of similar constitutional deprivations but, as *Canton* recognizes, the notice may also come from the municipality's own inherent awareness that certain of its employees, given the very nature of their employment, will face certain recurring constitutional obligations that clearly put the municipality on notice of a training need. *Id.* And *Canton*'s classic example of such "notice" precisely fits Jill Brown's case – the *obvious* need, apparent long before any pattern of excessive force emerges, to train police officers in the use of force. 489 U.S. at 390 n.10; *see also* 489 U.S. at 396-397 (O'Connor, J., concurring). The Court in *Bryan County* not only acknowledged but reaffirmed this aspect of *Canton*. 520 U.S. at 409-410.

Another recent Fifth Circuit case, *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), clearly demonstrates that the Fifth Circuit has a grasp of when municipal liability requires proof of a pattern of constitutional deprivations and when it does not. In *Snyder*, the plaintiff's failure to train theory was premised on an alleged obvious need to train officers in stress management techniques. *Id.* at 798. Under *Canton*, however, the need for more or different training must be so obvious that a failure to train can fairly be characterized as deliberate indifference to the need. 489 U.S. at 390. In other words, a municipality must be on sufficient notice of the training need so that a failure to respond to that need amounts to deliberate indifference. Viewed in light of *Canton*, the failure to train theory in *Snyder* and the failure to train theory in the present case are at opposite ends of the deliberate indifference spectrum. The need to train officers in the use of force versus the need to train officers in stress management techniques. The two theories are not even remotely analogous. The training need in the present case is inherently obvious (as recognized by *Canton*, at 390 & n.10)

while the training need in *Snyder* plainly is not. Thus, under *Canton*, the failure to train an officer in the use of force can constitute deliberate indifference to an obvious need even absent a showing of prior uses of excessive force by similarly untrained officers. On the other hand, the failure to train an officer in stress management techniques would be deliberately indifferent to an obvious need only in the event that a pattern of over-stressed officer behaviors indicated such a need. *See Canton*, 489 U.S. at 396-397 (O'Connor, J., concurring) (contrasting the failure to train officers in the use of force with the failure to train officers in diagnosing the symptoms of emotional illness). In short, while the facts of the present case precisely fit *Canton*'s classic example of when a municipality can be proven deliberately indifferent without pointing to a pattern of similar incidents, *Snyder* is a classic example of a case where the plaintiff should prove up a pattern of stress-related officer behaviors in order to demonstrate that the municipality was on notice of the particular need for stress management training. Consequently, the Fifth Circuit correctly identified the inadequate training theory in *Snyder* as legally deficient absent substantial proof of such a pattern. 142 F.3d at 798-799. Thus, *Snyder* shows that the Fifth Circuit appreciates the obvious contrast between cases like *Snyder* that do, and cases like the present one that do not, require proof of a pattern of constitutional violations in order to establish "deliberate indifference" under *Canton*.

C. The evidence produced at trial was legally sufficient to establish Bryan County's deliberate indifference to Burns' obvious need for force-related training.

Although Burns' record standing alone may not have been sufficiently predictive of a particular constitutional violation to establish municipal liability based on a theory of faulty *hiring*, this Court never suggested that Moore's knowledge of Burns' lengthy record was irrelevant to the policymaker's awareness of a substantial need

to *train*. Indeed, Burns' record – which not only involved violence but showed him to be an incorrigible scofflaw[9] – surely suggested to the policymaker that Burns was a rookie officer sorely in need of training and supervision in order to adequately prepare Burns not only to recognize but to respect the lines between constitutional and unconstitutional uses of force. And, although the Sheriff's decision to *hire* Burns despite his record may not have been highly predictive of a subsequent use by Burns of excessive force against a citizen, this Court's opinion supports a contrary conclusion regarding the Sheriff's later decision – again in spite of knowledge of Burns' criminal record – to put Burns on the street authorized to make forcible arrests prior to receiving any meaningful training of any kind, much less training regarding when and how to apply force to a citizen. *See* 520 U.S. at 410 ("predicting the consequence of a single hiring decision . . . is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties").

Finally, although Burns' criminal record and Sheriff Moore's response thereto may have been the only evidence of faulty municipal *hiring*, there was far more

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[9] Assault, Resisting Arrest, Public Drunkenness, Driving While Intoxicated, False Identification, several counts of Driving While License Suspended, and nine moving traffic violations. Tr. 317-320, 572-576. Just as significant as the nature of his record is the freshness of that record – virtually all those breaches of the law occurred in the two years immediately preceding Sheriff Moore's decision to put him on the streets authorized to make forcible arrests despite his utter lack of either training or supervision. Moreover, the Fifth Circuit, during its initial review of this case, emphasized that the jury could have believed that Sheriff Moore was lying when he claimed ignorance of the details of Burns' record. 67 F.3d at 1184. And this Court also found such a jury finding "plausible." 520 U.S. at 414.

evidence of faulty *training* than simply Burns' record and its attendant red flag that Burns was a person who, if hired, needed substantial training and supervision prior to being authorized to have significant physical contact with the public. Specifically, the following additional evidence of inadequate training was produced at trial:

1) *Burns' lack of law enforcement experience* – Stacy Burns testified that, prior to beginning work as a reserve officer, he had no experience as a law enforcement officer. Tr. 602.

2) *Burns' lack of formal departmental training of any kind from Bryan County* – Despite Burns' lack of experience, and his criminal history, Bryan County Sheriff's Department provided no formal departmental training to Burns. Tr. 600-605.

3) *Bryan County's lack of formal departmental training of any kind* – The County had no formal training program at all. Tr. 325, 327-331, 358, 600-602, 675-676.

4) *Burns' lack of informal departmental training from Bryan County* – Although Burns stated in his deposition that he had received no training at all through Bryan County, formal or otherwise, he remembered at trial that he had viewed one or more television programs broadcast on a state law enforcement training channel, Tr. 579, 601, and that he had ridden with his grandfather, Reserve Deputy Calclazier, "several" times in civilian clothes prior to being hired. Tr. 579. Even if that qualifies as some informal departmental training, a jury could have reasonably concluded that it was dramatically short of that necessary to address Burns' training needs, particularly since neither the television program nor his grandfather provided any specific training regarding when and how to apply force to a citizen.

5) *Little or no training at State Police Academy* – Bryan County's reliance on the training Burns allegedly received at Oklahoma's law enforcement training academy (known as CLEET) is wholly disingenuous. To put it bluntly, the County's "CLEET defense" blew up in its face at trial. Tr. 400-404, 516-517, 577-578, 600-608. Burns did

not even apply for classes until May 6, 1991, a scant 6 days prior to his use of excessive force against Jill Brown. Tr. 516-517. Because the classes were held only three days a week, Tr. 578, Burns had at most three sessions of CLEET training prior to injuring Jill Brown. Indeed, there was evidence introduced on which the jury could have based a finding that Burns had not attended *any* CLEET classes prior to his attack on Jill Brown. After claiming in his deposition that he had received several months of CLEET training prior to May 12, 1991 (the Jill Brown incident), Burns suffered a memory loss at trial (regarding the number of CLEET classes he had attended) after plaintiff established that he had not even applied for CLEET training until May 6, 1991. Tr. 516, 577, 600, 608. Moreover, the jury was familiar with Burns' record, which revealed a disregard both for the law and for truthfulness (the false identification); and he also admitted lying during his deposition. Tr. 576-577. Other evidence also shows that Burns attended *no* CLEET classes prior to his use of excessive force against Jill Brown.One form that had to be completed before Burns could be accepted into the CLEET program was dated May 30, 1991, eighteen days after he injured Jill Brown. Tr. 402-404. Burns' Employment Status Sheet, which must be filed with CLEET within ten days of hire, is dated June 12, 1991, thirty days after the Brown incident, and in excess of two months after he was hired. Tr. 400-402. Thus, it is simply not true, despite Petitioner's claim at page 5 of its Petition, that it was "undisputed" that Burns received force-related training at CLEET.[10]

6) *Policymaker authorization of Burns' use of force on citizens* – Despite Burns' lack of experience, training, and

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[10] Therefore, whatever federalism concerns are raised by holding state officials liable despite compliance with state law minimums for training that fail to adequately protect federal constitutional rights, that issue is simply not presented by the present case because of the substantial evidence of *non*compliance with state law detailed above.

supervision, Sheriff Moore authorized Burns to make forcible arrests. Tr. 604.

7) *Continued absence of training despite the fact that Burns repeatedly forced citizens to the ground at a rate that was "unusually high and excessive"* – Stacy Burns apparently enjoyed his authority to make forcible arrests since, of his first thirteen arrests, he forced the arrestee to the ground at least *five* times, Tr. 628, a record of force that Plaintiff's law enforcement expert characterized as "unusually high and excessive." Tr. 394. Because Bryan County has a small force and because the policymaker (Sheriff Moore) was Burns' uncle, Tr. 605, it would have been reasonable for the jury to infer that Sheriff Moore was aware of Burns' propensity to take citizens to the ground. Despite this, the County produced no evidence of training or supervision in response to Burns' common practices. In other words, the County's utter failure to adequately train Burns *before* setting him loose on the public was matched by its *continuing* failure to train him despite knowledge that his encounters with citizens were regularly escalating into uses of force.

8) *No specific training regarding how to conduct a roadblock or how to respond to situations that might arise* – Burns' general lack of training was also reflected in the absence of any specific instruction regarding situations likely to arise while conducting a "state line" road block in an alleged "high crime" area. Tr. 649. To wit, Burns received no training regarding roadblock procedures, Tr. 602, 605, 679-680, no training regarding pursuit across state lines, Tr. 602, and no training regarding his authority to arrest in Texas. Tr. 603.

9) *No supervision during the Jill Brown incident* – Burns received no supervision during the incident involving Jill Brown, Tr. 603-604, and no instructions during the pursuit. Tr. 609.

10) *Burns' misapplication of the arm-bar take down technique* – Jill Brown's description of Burns' use of force – *i.e.*, that she was grabbed by the arm, spun around, and thrown hard to the pavement, Tr. 52-55 – certainly belies

the notion that Burns used any legitimate "technique" for taking a citizen to the ground. Nevertheless, even assuming Burns was attempting such a "technique," plaintiff's law enforcement expert testified that Jill Brown's description of Burns' conduct did not reflect an appropriate execution of the arm-bar technique. Tr. 392, 541. Moreover, there was no need to use *any* force against Jill Brown. Tr. 347-348.

* * *

Finally, perhaps the strongest indication that Burns was inadequately trained is that, despite the compelling case of inadequate training (and supervision) detailed above, Bryan County was unable to produce even one person who could testify that someone – *anyone* – so much as discussed with Stacy Burns specifically when or how to apply force to a citizen.[11] In sum, there was abundant evidence that, due to grossly inadequate training, Officer Burns was an officer lacking specific tools to handle the recurring constitutional obligations regarding the use of force against citizens that law enforcement officers regularly face.

D. The evidence was legally sufficient to establish a direct causal link between the County's deliberately indifferent training failures and Burns' use of excessive force against Jill Brown.

When a municipality exhibits deliberate indifference by failing to train a police officer to handle those recurring situations presenting an obvious potential for the violation of a particular constitutional right, and that officer subsequently deprives a citizen of precisely that constitutional right, a jury clearly has sufficient evidence

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[11] Burns' grandfather vaguely testified that he taught Burns how to place a suspect in the officer's custody and control, but went on to explain that he meant how to "watch people," Tr. 690, which in no way addresses how and when an officer should apply force to a citizen.

on which to base a finding that the municipality's deliberately indifferent training failure directly caused (or was the "moving force" behind) the constitutional injury. *Bryan County*, 520 U.S. at 409-410. In the present case, the constitutional injury was a deprivation of Jill Brown's right to be free from excessive force, a right that *Canton* expressly noted constitutes one of those recurring constitutional obligations that police officers regularly face, but nevertheless one that Officer Burns, due to the training failures of Bryan County, was utterly unprepared to meet. This Court's earlier opinion in this litigation expressly recognizes that the requisite causal link between a municipality's deliberately indifferent training inadequacies and the constitutional deprivation suffered by a citizen may be readily inferred in a situation such as that posed by the present case:

> in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice – namely, a violation of a specific constitutional or statutory right. *The high degree of predictability may also support an inference of causation – that the municipality's indifference led directly to the very consequence that was so predictable.*

520 U.S. at 409-410.[12]

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[12] The interrelationship between "deliberate indifference" and "causation" is not surprising, since this Court has defined deliberate indifference narrowly so as to virtually assure a sufficient causal link between the municipality's inadequacies and its officer's unconstitutional conduct. *See Canton*, 489 U.S. at 385-386, 388-389.

Indeed, the present case is a classic example of one that fits within the "narrow range of circumstances" that both *Canton* and *Bryan County* held open to municipal liability. This case involves an utter failure to train an officer (one particularly in need of training not only because of his rookie status but also because of what the policymaker knew about his character and his lack of respect for the law) to handle a recurring obligation that police officers regularly face (indeed, *Canton*'s precise example of a recurring obligation) – *i.e.*, the obligation to avoid using excessive force against a citizen. The failure of the County policymaker (Sheriff Moore) to require his nephew (Burns) to undergo any meaningful force-related training – *e.g.*, when to use force against a citizen, when to take them to the ground, and how to apply force so as to avoid serious injury – and the continuing failure of Bryan County to require such training despite knowledge that Burns was taking an inordinate percentage of citizens to the ground, created such a high degree of predictability that a particular constitutional deprivation would occur (namely, a deprivation of the Fourth Amendment right to be free from excessive force) as to constitute municipal deliberate indifference. And, with respect to causation, to use this Court's own words, "[t]he high degree of predictability may also support an inference of causation – that the municipality's indifference led directly to the very consequence that was so predictable." *Bryan County*, 520 U.S. at 409-410.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 29 2001
OFFICE OF THE CLERK

(3)

No. 00-1311

IN THE

Supreme Court of the United States

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

v.

JILL BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* EL PASO COUNTY, TEXAS AND THE EL PASO COUNTY SHERIFF IN SUPPORT OF PETITIONER

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21 pp

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INTEREST OF THE *AMICI CURIAE*[1]

El Paso County, Texas, has a population of nearly 700,000 people. Its sheriff employs 763 full-time deputies and 15 reserve deputies. Because the county and the sheriff are periodically sued under § 1983 for alleged failure to train, generally resulting in summary judgment in their favor, both have a vital interest in the standard of liability applied in this case.

SUMMARY OF THE ARGUMENT

The Fifth Circuit should have reviewed the respondent's single-incident failure-to-train claim under the standard established by this Court, addressing: (1) whether the respondent's Fourth Amendment rights were violated by a reserve deputy sheriff as alleged; and if so, (2) whether the sheriff failed to train reserve deputies to handle recurring situations presenting an obvious potential for such violations; and (3) whether, in light of a reserve deputy's duties, the need for more or different training was so obvious that the sheriff could reasonably be said to have been deliberately indifferent to the need.

Instead, the Fifth Circuit erred by creating its own totality-of-circumstances standard. Under this new hybrid standard it held that, in evaluating the respondent's failure-to-train claim, the jury could properly have considered the following additional factors: (1) the personal background of the reserve deputy who allegedly violated the respondent's

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1. This brief was filed with consent of both parties and was authored in whole by counsel for the *amici curiae* with no monetary contribution from any outside source for its preparation or submission.

federal rights; (2) the on-the-job performance of this deputy; (3) a family relationship between the sheriff and this deputy; and (4) the sheriff's alleged failure to adequately supervise this deputy. Because consideration of any of these additional factors is inconsistent with the strict standards of culpability and causation this Court has established in § 1983 cases, the Fifth Circuit's augmented approach should be rejected in its entirety.

Further, had the Fifth Circuit reviewed the respondent's claim under the standard established by this Court, it could only have concluded that more or different training for Bryan County reserve deputy sheriffs was unnecessary, rather than so obviously needed that the sheriff could be said to have been deliberately indifferent to the need.

Note: El Paso County and the El Paso County Sheriff agree with the petitioner that, under the facts of this case, liability under § 1983 should not be imposed without a pattern or practice of constitutional violations and, further, that the record shows no decision by Sheriff Moore not to train or supervise Reserve Deputy Burns. To avoid repetition, these points will not be argued in this brief.

ARGUMENT

I. The Fifth Circuit erred by failing to apply the standard of liability established by this Court for a single-incident failure-to-train claim brought under § 1983.

Two separate claims under 42 U.S.C. § 1983 were submitted to the jury in this case: a single-incident failure-to-screen claim and a single-incident failure-to-train claim.

Brown v. Bryan County, Okla., 219 F.3d 450, 454 n.2 (5th Cir. 2000). In its 1997 opinion, this Court rejected the failure-to-screen claim, holding that several misdemeanor offenses in a reserve deputy sheriff's background, including a single assault conviction stemming from a campus fight, were insufficient to demonstrate a proclivity to violence against the person. *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 414 (1997). Without such a proclivity, the deputy's alleged use of excessive force in violation of the Fourth Amendment was not a plainly obvious consequence of the sheriff's decision to hire him. *Id.* at 415. In the absence of such a plainly obvious consequence, this Court held that the hiring decision, though it may have been ill-advised, failed to reflect deliberate indifference to the respondent's Fourth Amendment rights. *Id.*

This Court did not address the failure-to-train claim in its 1997 opinion because the Fifth Circuit had not yet addressed it. *Id.* at 402. Nevertheless, this Court hypothesized that it might be possible for a plaintiff to prevail on a failure-to-train claim against a municipality under § 1983 based on a single incident, that is, without showing a "pattern of constitutional violations." *Id.* at 409. But to do so, in addition to showing that a federal right was violated, the plaintiff would further have to show that the municipality "failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Id.* Moreover, the plaintiff would have to show that "in light of the duties assigned to specific officers or employees, the need for more or different training [wa]s so obvious . . . that the policymakers of the [municipality] can reasonably be said to have been deliberately indifferent to the need." *Id.* Deliberate indifference is a "stringent standard of fault,"

id. at 410, one the Court anticipated could be met in a single-incident failure-to-train context only in a "narrow range of circumstances," *id.* at 409.

On remand, without a new trial, the district court entered judgment in favor of the respondent on the single-incident failure-to-train claim. *Brown v. Bryan County, Okla.*, 219 F.3d at 453. When this judgment was appealed, the Fifth Circuit should have reviewed the failure-to-train claim under the standard established by this Court, addressing: (1) whether the respondent's Fourth Amendment rights were violated by the reserve deputy; and if so, (2) whether the sheriff failed to train reserve deputies to handle recurring situations presenting an obvious potential for such violations; and (3) whether, in light of a reserve deputy's duties, the need for more or different training was so obvious that the sheriff could reasonably be said to have been deliberately indifferent to the need.

Instead, the Fifth Circuit created its own totality-of-circumstances standard. Under this new hybrid standard, it held that, in evaluating the respondent's failure-to-train claim, the jury could properly have considered the following additional factors: (1) the personal background of the reserve deputy who allegedly violated the respondent's federal rights; (2) the on-the-job performance of this deputy; (3) a family relationship between the sheriff and this deputy; and (4) the sheriff's alleged failure to adequately supervise this deputy. Because consideration of any of these additional factors is inconsistent with the strict standards of culpability and causation this Court has established in § 1983 cases, the Fifth Circuit's augmented approach should be rejected in its entirety.

A. Personal background of reserve deputy whom sheriff allegedly failed to train should not have been considered.

1. Preclusion by this Court's opinion

The Fifth Circuit noted the following regarding the background of Reserve Deputy Stacy Burns ("Burns"), the officer who allegedly violated the respondent's federal rights:

> His record of having engaged in some inappropriate conduct before joining the force is undisputed. Within the two-year period before his hire, Burns had been arrested for assault and battery, resisting arrest, public drunkenness, driving while intoxicated, possession of false identification, driving with a suspended license, and nine moving traffic violations. At the time he was hired, Burns was in violation of the terms of his probation; for that reason he had an outstanding warrant for his arrest.

Brown v. Bryan County, Okla., 219 F.3d at 454-5.

The Fifth Circuit held that the jury could have found that this background should have alerted the sheriff to "an especially pressing need to train Burns, especially with respect to when and how to use force." *Id.* at 458. The Fifth Circuit further held that this "exuberant and reckless background" contributed to a "high predictability of citizen injury by the untrained Burns," *id.* at 462, supporting the jury's finding that, by failing to train him, the sheriff demonstrated deliberate indifference to the respondent's Fourth Amendment rights, *id.* at 463.

Even assuming personal background information might be relevant in a failure-to-train claim, such jury findings would be flatly inconsistent with the holding of this Court in this case regarding the exact same set of facts. This Court held that even the most damaging fact in Burns' background, a misdemeanor assault conviction, was, as a matter of law, insufficient to demonstrate a "proclivity to violence against the person." *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 414. Without such a proclivity, Burns' alleged use of excessive force could not have been a plainly obvious consequence of the decision to hire him. *Id.* at 415. In the absence of such a plainly obvious consequence, this Court held that the decision to hire Burns could not be said to have been made with deliberate indifference to the respondent's Fourth Amendment rights. *Id.*

Similarly, while thorough training in the use of force is both appropriate and necessary for all law enforcement officers, because Burns' background showed no proclivity towards violence, it could neither have alerted the sheriff to "an especially pressing need" to train him regarding "when and how to use force," 219 F.3d at 458, nor contributed to a "high predictability of citizen injury by the untrained Burns," *id.* at 462. That is, without a showing of proclivity to violence, Burns' alleged use of excessive force could no more have been a plainly obvious consequence of a failure to train him than of the decision to hire him in the first place. In the absence of such a plainly obvious consequence, there can be no finding of deliberate indifference or liability under § 1983.

The Fifth Circuit's failure to follow this Court's ruling on sufficiency of the evidence merits correction and should not be allowed to stand as precedent. Proponents of failure-to-screen claims lacking proof that the background of a job

applicant is plainly obvious to result in deprivation of a federal right should be barred from simply recasting such claims, without modification, as failure-to-train claims. The result is a second bite at the apple in which the same background of the same job applicant may be found to result in deprivation of the same federal right solely because a lesser standard of proof of underlying facts is required the second time around.

2. Irrelevance in the failure-to-train context

The Fifth Circuit's holding that the jury could have found a "high predictability of citizen injury" based on a failure to train Burns in light of his background, *id.* at 462, apart from being inconsistent with this Court's ruling on sufficiency of the evidence, further reflects a fundamental flaw in reasoning.

Had a stronger showing of propensity towards violence been made in this case, this Court might have reached a different conclusion regarding liability for the decision to hire Burns. Had his record reflected, for example, a string of recent felony convictions for violent crimes against the person, rather than a one-time misdemeanor stemming from a fraternity fracas, this Court might have concluded it was plainly obvious that hiring Burns would result in a high risk of the use of excessive force, thus justifying a finding that the sheriff was deliberately indifferent to the respondent's Fourth Amendment rights.

Significantly, however, the same reasoning cannot be imported into the failure-to-train context. It may be clear that *hiring* a violent person as a law enforcement officer creates an increased risk of violence against citizens, but it is unclear that *failing to train* such a person will have the same result

or the opposite. Sending a person with a violent predisposition to law enforcement training is like sending a schoolyard bully to karate class. It is possible the bully will come away from the class with a new-found sense of self-discipline and increased respect for others. On the other hand, it is equally possible the class will merely make the bully a more efficient bully, adding to his or her repertoire of tactics for forceful intimidation. Likewise, the failure to subject a violent individual to law enforcement training might represent a missed opportunity to set the individual straight, a chance to create in him or her a new-found respect for the law and the criminal justice system. Alternatively, it might represent a disaster averted, a fortuitous omission leaving the individual far less of a menace than training in law enforcement methods and tactics would have rendered him or her.

Thus, no matter how appropriate or valuable law enforcement training might be for other trainees, it cannot be said with any certainty whether exposing a person with violent tendencies to such training will be beneficial or detrimental. Without such an obvious consequence, there can be no finding of deliberate indifference and therefore no liability under § 1983.

The Fifth Circuit's holding that a law enforcement officer's personal background is relevant in a failure-to-train claim merits correction. Because it is logically flawed, it will likely result in misdirection of resources as municipalities struggle to resolve in the training context problems more appropriately addressed in the hiring/firing context.

B. On-the-job performance should not have been considered.

Regarding the on-the-job performance of Reserve Deputy Burns, the Fifth Circuit noted that within a matter of weeks of first joining the force, he "had already arrested some individuals, i.e., he was engaging in conduct with the potential for harm and that required training." 219 F.3d at 458. The Fifth Circuit further noted Burns' testimony at trial that "out of his twelve arrests, he had forced three or four individuals 'to the ground.' " *Id.* at 462. The Fifth Circuit concluded that these facts, like his personal background, contributed to "the high predictability of citizen injury by the untrained Burns," supporting the jury's finding that, by failing to train him, the sheriff demonstrated deliberate indifference to the respondent's Fourth Amendment rights. *Id.* at 462-63.

There is no question that a "pattern of constitutional violations" may form the basis for liability under § 1983. However, with respect to the conduct of Burns in making arrests, apart from the single incident involving the respondent, there is no allegation of constitutional harm. There is no suggestion that improper techniques were used. There is no suggestion of physical injury. There is no suggestion of the use of excessive force, for example, that the forcing of any individual to the ground might have been unwarranted under the circumstances. Although it noted that Burns used force more often than might be expected on average, *id.* at 462, the Fifth Circuit gave no indication of any reason whatsoever to believe that Burns acted in a less than appropriate or even exemplary manner in carrying out the arrest of any individual other than the respondent.

The Fifth Circuit may be correct that the act of arresting a person involves "the potential for harm" and "require[s] training." *Id.* at 458. However, the absence of any complaints associated with Burns' numerous prior arrests tends, if anything, to make his misconduct in arresting the respondent surprising rather than predictable. Certainly a law enforcement officer's unblemished, complaint-free arrest record, which includes several arrests that required the use of force, cannot be said to provide notice that the use of excessive force by the officer is plainly obvious to result if additional training is not provided. Without such a plainly obvious result, Burns' on-the-job performance cannot be considered evidence of deliberate indifference justifying imposition of liability under § 1983.

The Fifth Circuit's inclusion of on-the-job performance as a factor to be considered in the jury's evaluation of the respondent's failure-to-train claim is error that merits correction. The facts of this case provide no justification for revising this Court's standard to include such a factor.

C. Family relationship should not have been considered.

Reserve Deputy Burns was the son of the sheriff's nephew. *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 401. The Fifth Circuit held that the jury could properly have considered this fact as evidence that it was "highly unlikely that Burns was 'lost in the crowd,' and his training simply neglected." *Brown v. Bryan County, Okla.*, 219 F.3d at 458. The Fifth Circuit further held that, based in part on this family relationship, the jury could reasonably have inferred that the sheriff had "full notice of the full extent of Burns' exuberant and reckless background,"

and also notice of his " 'taking down' a number of arrest subjects." *Id.* at 462. The Fifth Circuit thus included this family relationship among the factors contributing to "the high predictability of citizen injury by the untrained Burns." *Id.*

First, whether the sheriff had notice of Burns' background is irrelevant in the failure-to-train context. This Court has already held that, as a matter of law, Burns' background did not demonstrate a proclivity to violence, *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 414, but even if it had, as pointed out in Section I.A.2. of this brief, it is unclear whether a failure to train him would have made matters better or worse.

Second, whether the sheriff had notice of Burns' conduct in making arrests is likewise irrelevant. As pointed out in Section I.B. of this brief, Burns' arrest record showed no pattern of constitutional harm or likelihood of such harm. If it had, the pattern itself would have served to provide notice for purposes of showing deliberate indifference under § 1983, and the existence of a family relationship would have added nothing. Thus, the fact that Burns and the sheriff were related is simply irrelevant.

The Fifth Circuit's error in including family relationship as a factor to be considered in failure-to-train claims merits correction. Inclusion of such an irrelevant factor could only mislead the jury regarding the proper basis for liability under § 1983.

D. Alleged failure to adequately supervise should not have been considered.

Regarding supervision of Reserve Deputy Burns, the Fifth Circuit noted that: (1) the sheriff may have failed to timely complete paperwork required to enroll him in state-mandated training, with the result that at the time of his encounter with the respondent, he may have had little or no classroom training; (2) no "enforcement mechanisms" were in place to ensure that deputies-in-training utilized instructional videotapes; (3) the sheriff had "no formal departmental policies regarding supervision of junior officers to assist Burns or to limit his conduct" and (4) the sheriff failed to "instruct deputies about their responsibilities to supervise a reserve deputy." *Brown v. Bryan County, Okla.*, 219 F.3d at 458. The Fifth Circuit held that lack of supervision was yet another factor contributing to "the high predictability of citizen injury by the untrained Burns," supporting the jury's finding that, by failing to train him, the sheriff demonstrated deliberate indifference to the respondent's Fourth Amendment rights. *Id.* at 463.

Like the risk associated with failure to properly screen a single job applicant, however, the risk associated with failure to properly supervise a single employee is "not 'obvious' in the abstract." *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 410. Rather, it will depend in part on the background and character of the employee in question. Some deputies-in-training may tend to be overly passive and averse to conflict, others overly aggressive and predisposed towards violence. Confronted with a dangerous situation on the street, without classroom training and close on-the-scene supervision, the former might tend to cower in the patrol car or even flee the scene, while the latter might

tend to engage in physically intimidating or abusive behavior. Similarly, given the opportunity to attend classroom training and/or view instructional videotapes, with no "enforcement mechanisms" to compel participation, some deputies-in-training might jump at the chance to learn to do their jobs properly, while others might tend to slack off. Thus, as in the failure-to-screen context, a "generalized showing of risk" from the failure to supervise cannot alone lead to a conclusion of deliberate indifference, *id.* at 410-11; it must further be shown that "[t]he connection between the background of the particular [employee] and the specific constitutional violation alleged [is] strong," *id.* at 412.

Again, this Court has already held that, as a matter of law, Burns' background did not demonstrate a proclivity to violence. *Id.* at 414. Further, nothing noted by the Fifth Circuit would suggest that Burns had a lack of interest in receiving training or in learning about proper law enforcement tactics and techniques. Without such tendencies, Burns' alleged use of excessive force could not have been the plainly obvious result of a failure to properly supervise him any more than of the decision to hire him. In the absence of such a plainly obvious consequence, a failure to supervise Burns cannot be said to have been the result of deliberate indifference to the respondent's Fourth Amendment rights.

Further, supposing Burns had demonstrated a high predisposition to violent behavior or a total disinterest in participating in training activities, it is far from obvious that any amount of compelled training, close supervision, or other measures short of discharging him would have solved the problem. Responsibility both for pre-employment screening to eliminate bad applicants and for resolving any serious background or character-related problems that may surface

during employment should begin and end in the hiring/firing sphere. No other municipal domain has the tools required to deal with such problems. It makes no sense to lay such problems at the doorstep of other municipal functions like supervising or training which, no matter how well-executed, are unlikely to provide a solution.

The Fifth Circuit's inclusion of failure to supervise as a factor to be considered in evaluating a failure-to-train claim is an error that merits correction. By placing irrelevant municipal deficiencies before the jury, this factor is likely to lead juries to disregard the strict standards of causation and culpability required in § 1983 cases.

II. Had it applied the standard established by this Court, the Fifth Circuit could only have concluded that more or different training for Bryan County reserve deputy sheriffs was unnecessary, rather than so obviously needed that the sheriff could be said to have been deliberately indifferent to the need.

As described by the Fifth Circuit, the training program for reserve deputies in Bryan County included the following: (1) Oklahoma's Commission on Law Enforcement Education and Training ("CLEET") classes; (2) Law Enforcement Training Network classes on videotape; and (3) on-the-job training. *Brown v. Bryan County, Okla.*, 219 F.3d at 455.

The CLEET program trains officers in "all aspects of law enforcement, including patrol tactics, the use of force, public safety, and the like" and specifically includes training on "the use of 'auto extraction techniques' such as the arm bar technique allegedly employed by Burns [during the incident forming the basis of the plaintiff's suit]." *Id.* n.6.

The Fifth Circuit noted that the parties agreed that CLEET training is mandatory for all Oklahoma law enforcement officers, including reserve deputies. *Id.* Significantly, the Fifth Circuit expressly stated that its opinion "should not be construed to reflect a finding that training through CLEET is somehow inadequate." *Id.*

Given the existence of such a comprehensive program, the centerpiece of which — CLEET training — the Fifth Circuit expressly declined to find deficient, the Fifth Circuit should have concluded that more or different training for Bryan County reserve deputies was unnecessary, rather than so obviously needed that the sheriff could be said to have been deliberately indifferent to the need.

Instead, the Fifth Circuit concluded that Bryan County had a "practice of providing no training" for reserve deputies. *Id.* at 456. Although this holding may in part refer to the sheriff's alleged failure to ensure that Burns actually participated in training, a supervisory deficiency addressed in Section I.D. of this brief, it appears to reach beyond that.

The Fifth Circuit found it relevant that "the County itself d[id] not train its officers," *id.* at 455, had "no funds to train personnel," *id.*, and thus had "a policy of providing no training itself," *id.* It pointed out that two expert witnesses "corroborated this lack of training." *Id.* It further pointed to testimony by an experienced deputy that he "had received no training from [Bryan] County." *Id.* These facts should have had no place in the Fifth Circuit's or the jury's consideration of this case. In the absence of a finding that CLEET was in some way deficient, it is simply irrelevant that the County itself provided no additional training.

In addition, the Fifth Circuit noted the following:

> We are sympathetic to the budget problems of local governments, especially rural counties. The plaintiff's expert, however, outlined a range of no-cost training options. The County's expert testified that CLEET provides training material for local police forces at no cost, will work with local police agencies to develop a training program without charge, and holds free regional training sessions across the State of Oklahoma. According to the evidence, Sheriff Moore elected not to pursue any of these options.

Id. n.7.

Why, if Burns was required by law to participate in CLEET training, the adequacy of which is not questioned, should the sheriff be faulted for electing not to pursue additional options, rather than simply for failing to ensure Burns' attendance at CLEET? This is perhaps the most troubling aspect of the Fifth Circuit's opinion: its suggestion that, despite having a comprehensive training program with no identified deficiencies, a county may nevertheless be found at fault for failing to commit additional resources to supplement such training.

This Court's standard for a single-incident failure-to-train claim boils down to a simple question: whether violation of a federal right is the obvious consequence of "a particular glaring omission in a training regimen." *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 410. In answering this question, the Fifth Circuit would allow a jury to consider evidence relating to such matters as personal

background, on-the-job performance, family relationships, and supervisory issues, none of which could move the jury any closer to answering the question. In addition, it would allow the jury to skip this central question altogether — decline to find that the training regime contained an omission, glaring or otherwise — and move directly to a finding that the failure to provide additional training demonstrates deliberate indifference.

Permitting a jury to fail to consider the central question in this Court's standard of liability, in addition to permitting it to consider various irrelevant questions, is error that merits correction by this Court.

CONCLUSION

The judgment of the Fifth Circuit should be reversed, and judgment rendered in favor of Bryan County.

Respectfully submitted,

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